(2)

Supreme Court, U.S.
FILED

No. _____

01 856 NOV 29 2001

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

BEVERLY B. MANN,

Petitioner,

v.

DOROTHY BROWN, AS CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, AND COOK COUNTY, ILLINOIS,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

152pp

PLEASE NOTE: A few of the items below are identified in the Petition as different appendices than they actually are; e.g., three documents are identified in the Petition as App. G, but only one of them actually appears as App. G. (The other two appear respectively as Apps. X and Y.) Also, many of the documents below, while referenced in the Petition, are not identified in the Petition as appearing in the appendix.

This is because Petitioner planned initially to appeal only from the Sept. 19 and Oct. 16 orders and not from the portion of the Aug. 31 order that became final on that date, preferring instead to invoke Illinois' "savings" statute and refile the case in state court. She will do that shortly but decided only very recently to appeal to this Court from the final portions of the Aug. 31 order also. Thus to file it by (on) the deadline, she filed it without refining, proofreading and editing it.

This also is why she bound only the August 31 order and her response to the "show cause" portion with her Petition; she couldn't compile and reformat the remainder in time to include them.

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*2001 U.S. App. LEXIS 19829, **

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants-Appellees.

Nos. 99-1750 & 99-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2001 U.S. App. LEXIS 19829

August 15, 2001 *, Submitted

* After an examination of the briefs and the records, we have concluded that oral argument is unnecessary, and the appeals are submitted for decision. See Fed. R. App. P. 34(a); Cir. R. 34(f).

August 31, 2001, Decided

NOTICE: [*1] RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 98 C 8004. Harry D. Leinenweber, Judge.

DISPOSITION: Appeal No. 99-1750 dismissed as moot. On appeal No. 99-3595, the judgment of the district court vacated, and the case remanded with instructions to abstain. An order

to show cause entered, returnable within 14 days.

COUNSEL: BEVERLY B. MANN, Plaintiff - Appellant (99-1750, 99-3595), Pro se, Chicago, IL USA.

For COOK COUNTY, DOROTHY BROWN, Defendants - Appellees (99-1750, 99-3595): Mary D. Mallo, OFFICE OF THE STATE'S ATTORNEY OF COOK COUNTY, Chicago, IL USA.

JUDGES: Before Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge.

OPINION: Order

This is the culmination of an absurd, and absurdly protracted, effort by a lawyer who filed a tort suit in state court to litigate particular issues in federal court. Beverly Mann filed a products-liability suit against Upjohn Company. After dismissing that suit in [*2] 1992 to avoid the judge's order that she submit to discovery, Mann filed again in 1993, and again failed to provide information in discovery despite judicial orders requiring her to do so. Mann took the position that she alone would decide what information Upjohn received. Ensuing sanctions hampered her ability to present evidence at trial. Mann turned to federal court, asking for an order compelling the state court to grant a continuance. That quest was unavailing. When the case was called for trial in April 1998, Mann, a member of the bar representing herself, refused to proceed. The judge dismissed the suit for want of prosecution, and Mann appealed. Under 705 ILCS 105/27.2a(k)(4) she had to pay a record-preparation fee of $ 150 plus 25 [cents] for each page over 200. This was no more acceptable to Mann than the discovery rulings had been. She was willing to pay $ 150 for preparing the whole record

(which weighed in at over 6,000 pages) but no more.

Supreme Court Rule 298 provides for full or partial waiver of the fee for those who are unable to pay it. Mann, who concedes ability to pay, contends only that paying the fee would be a "hardship." Abjuring the means provided by state [*3] law for relief, Mann asked the judge in the state case to declare § 105/27.2a(k)(4) unconstitutional as a violation of the equal protection clause in the fourteenth amendment and as a "hidden tax" in violation of the state's constitution, Art. I § 12 of which provides for access to the courts. This provision reads: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." Mann's theory is that the charge exceeds the cost of preparing the record, is deposited in the county treasury, and thus is a "tax" on litigation that abridges the right of access.

After the trial judge denied Mann's request for relief, she did not appeal within the state system. Instead she filed a federal suit (No. 98 C 6078) under 42 U.S.C. § 1983, making the same constitutional arguments that had been presented to the state trial judge. This was dismissed under the *Rooker-Feldman* doctrine after the district judge concluded that it was just a (poorly) disguised attack on the decision of the state trial judge. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923); [*4] *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). Mann's next step was to file an original action in the Supreme Court of Illinois--seeking to invoke not Rule 298 (a request that should have been addressed to the trial or appellate courts) but Supreme Court Rule 381, which deals with challenges to revenue statutes. That court promptly denied Mann's request for leave to commence an original action. Mann also presented a new request to the trial judge in the products-liability case. That

judge made it clear that the earlier decision had been, not on the merits, but procedural. The judge viewed Mann's motion as an inappropriate effort to convert the products-liability case into some new constitutional claim.

Mann could have appealed that decision within the state's hierarchy but did not. Instead she returned to federal court, first by filing a Rule 60(b) motion in No. 98 C 6078 and, after that failed, by commencing a few federal suit, which was docketed as No. 98 C 8004. (She did not appeal the final decision in No. 98 C 6078.) In this new proceeding--Mann's third federal suit arising out of a single state action--Mann [*5] demanded an injunction, a writ of prohibition, and other relief against the state's implementation of § 105/27.2a(k)(4). This suit could have been dismissed on preclusion grounds; a disappointed litigant must appeal rather than file another suit, even if developments after entry of the first judgment show that the decision was incorrect. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981). But the defendants did not invoke the law of claim preclusion (res judicata). Instead they defended on the merits. The district judge concluded that the state judge's explanation lifted the *Rooker-Feldman* doctrine. Now, the federal judge believed, Mann was attacking § 105/27.2a(k)(4) itself rather than the state court's decision. (This is a doubtful proposition; Mann's only grievance is the state judicial system's application of § 105/27.2a(k)(4) to her appeal. But just as the Supreme Court avoided the *Rooker-Feldman* issue in *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987), we need not consider it here.) Nonetheless, this did Mann no good, because the district judge concluded [*6] that she is very unlikely to prevail on the merits and declined to afford interlocutory equitable relief. 1999 U.S. Dist. LEXIS 2804 (N.D. Ill. Mar. 2, 1999). Mann's appeal from this decision has been docketed as No. 99-1750.

While that appeal was being briefed, the district court

dismissed Mann's complaint on the merits. 1999 U.S. Dist. LEXIS 13426 (N.D. Ill. Aug. 3, 1999). The court ruled that a fee for record preparation in an ordinary civil lawsuit is not subject to the special rules for criminal litigation by indigents, exemplified by cases such as *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956), but is more like the filing fee in bankruptcy, see *United States v. Kras*, 409 U.S. 434, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1973). The Supreme Court held in *Kras* that a filing fee for bankruptcy is not unconstitutional even if set so high that some people cannot afford it; and if one can be too poor to go bankrupt, the district judge concluded, there is no possible constitutional objection to a fee in litigation that imposes a "hardship" on one who is able to pay. Mann's appeal from this decision has [*7] been docketed as No. 99-3595. Meanwhile the state appeal proceeded, and the judgment dismissing the suit has been affirmed. *Mann v. Upjohn Co.*, 2001 Ill. App. LEXIS 531 (1st Dist. June 29, 2001). Either Mann paid the fee under protest or the state court decided to overlook the nonpayment. In neither event is the federal case moot. If Mann paid, she could get the money back if she were to prevail; and if Mann did not pay, the state may dun her for the money, or the lack of payment may impede review by the Supreme Court of Illinois (or future appeals Mann may pursue, for she is a frequent filer).

Defendants contend that the district court's judgment on the merits moots appeal No. 99-1750. For her part, Mann insists that the district court lacked jurisdiction to adjudicate the merits while No. 99-1750 was pending. Mann's position is incorrect. Although an appeal usually deprives the district court of jurisdiction to proceed, an appeal under 28 U.S.C. § 1292(a)(1) from the denial of an interlocutory injunction is an exception to that norm. *See Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir. 1979); *Abramson v. University of Hawaii*, 594 F.2d 202 (9th Cir. 1979). [*8] So No. 99-1750 no longer matters, and that appeal is dismissed as moot. (Because the final judgment automatically supersedes the

denial of interlocutory relief, it is unnecessary to vacate the earlier decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 95 L. Ed. 36, 71 S. Ct. 104 (1950).)

As for No. 99-3595: We decline the parties' request to reach the merits. This case has no business being in federal court and should have been dismissed immediately after its filing. One reason is the Tax Injunction Act, 28 U.S.C. § 1341. Mann characterizes the charge as a "tax," and if that is correct then § 1341 bars any federal interference if a plain and speedy remedy is available in state court. Supreme Court Rule 298 offers one such remedy; asking the state's court of appeals for relief from the charge is another. Mann pursued neither. If, however, the charge is not a "tax" (and it hardly seems like one; Mann does not contend that the congeries of fees charged to litigants, including all filing and record-preparation charges, is a net money-raiser for the state after all expenses of running the judicial system have been accounted for) then [*9] § 1341 does not apply--but much of Mann's substantive argument is sunk. So far as the federal Constitution is concerned, it makes no difference whether fees go into the state (or county) treasury, which then underwrites the judicial system, or instead are deposited into a separate fund under the control of the courts.

Whether the fee is a "tax" does not matter in the end, however, because the district court should have abstained. This suit is a replay of *Pennzoil*, in which Texaco, having suffered a large judgment at trial in a state court, asked a federal court for relief against the bond that state law required as a condition of appeal. Texaco contended that the bond would serve as an *absolute* bar to appeal under the circumstances, a more grievous injury than the "hardship" of which Mann complains, and the source of a better constitutional argument. See *Lindsey v. Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972). Still, the Supreme Court held, it would be inappropriate for a federal tribunal to interfere with ongoing state litigation. See,

e.g., *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); 28 U.S.C. § 2283. [*10] Texaco had to present its constitutional arguments to the state judiciary, with the option to seek review in the Supreme Court under 28 U.S.C. § 1257. Mann should have proceeded in the same way. After the state's trial judge rejected her contention, she should have sought review within the state system and then, if necessary, by the Supreme Court of the United States. Instead she bolted to federal district court, which under *Pennzoil* can offer no relief.

Defendants have not sought abstention under *Younger* and *Pennzoil*, but federal courts are entitled to abstain on their own--not only to protect states from errors by their lawyers (the State's Attorney of Cook County, representing the defendants in this case, may not have the interests of the whole State at heart), and to avoid unnecessary decisions on constitutional questions, but also to protect themselves from impositions of the kind that Mann has perpetrated. See *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985). Mann contends that the fee violates the Constitution of Illinois as well as the Constitution of the United States. That argument, presented [*11] to a state court, could have avoided any need for federal decision, even by the Supreme Court on certiorari under § 1257. Moreover, the fact that the appeal in the state case has concluded does not lift the abstention doctrine; one may not avoid a state forum by waiting until its process has concluded. See *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995).

These proceedings not only imposed on the federal courts (and the defendants) but also appear to come within the scope of 28 U.S.C. § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the

> proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Mann, an attorney, has multiplied these proceedings unreasonably and, in an objective sense, vexatiously. See *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985). The tort suit was filed, dismissed, refiled, and lasted for five more years before it was dismissed, on the date set for trial, because Mann [*12] refused to participate. Proceedings were marred by Mann's failure to follow judicial orders concerning discovery and by her generally inappropriate conduct. The state's appellate court rebuked Mann for "inexcusable" abuse of opposing counsel as well as "lack of cooperation ... in obeying court orders, indifference to the trial court's advice and admonishments, repeated attempts to delay the proceedings, and a failure to follow the rules of proper procedure." The state portion of this litigation included, in addition to the main case (filed twice and unduly dragged out) and the original action in the Supreme Court of Illinois, repeated efforts to disqualify a judge. The federal portion has included the three suits we have mentioned plus additional motions to disqualify, requests for sanctions (Mann's motions were denied and she was ordered to pay $ 100 to the defendants under Fed. R. Civ. P. 11), and the two appeals from No. 98 C 8004 plus post-judgment motions practice in No. 98 C 6078. One suit has been turned into six, each characterized by needless contretemps.

We therefore direct Mann to show cause, if any she has, why she should not be ordered "to satisfy personally the excess [*13] costs, expenses, and attorneys' fees reasonably incurred because of such conduct." We limit this order to costs and expenses the defendants have incurred in the federal portion of the litigation. Mann may file her response within 14 days. Within the same time, defendants should file with the court an

estimate of the total expenses they have incurred in both the district court and this court. This should include an estimate of the market value of the services provided by their in-house legal staffs. See *Central States Pension Fund v. Central Cartage Co.*, 76 F.3d 114 (7th Cir. 1996).

Appeal No. 99-1750 is dismissed as moot. On appeal No. 99-3595, the judgment of the district court is vacated, and the case is remanded with instructions to abstain. An order to show cause will be entered, returnable within 14 days.

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants-Appellees.

Nos. 99-1750 & 99-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

August 31, 2001

***Before*:**

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

Pursuant to this court's unpublished final order issued on this date, appellant Beverly B. Mann is directed to show cause, if any she has, why she should not be ordered "to satisfy personally the excess [*13] costs, expenses, and attorneys' fees reasonably incurred because of such conduct." We limit this order to costs and expenses the defendants have incurred in the federal portion of the litigation. Mann may file her response within 14 days. Within the same time, defendants should file with the court an estimate of the total expenses they have incurred in both the district court and this court. This should include an estimate of the market value of the services provided by their in-house legal staffs. See *Central States Pension Fund v. Central Cartage Co.*, 76 F.3d 114 (7th Cir. 1996).

This is the state-court order upon which much of the federal appeals court's orders were premised. The order incorrectly identifies 705 ILCS 105/27.2a(k)(4) as 735 ILCS 105/27.2a(k)(4).

Beverly Mann,
Plaintiff,
v. No. 92 L 13054
The Upjohn Company,
Defendant.

ORDER

This cause coming on to be heard on plaintiff's motion for leave by the parties to jointly remove most documents from the court record, or, alternatively, to find unconstitutional subsection (k)(4) of the Illinois Clerk of Court's Act, 735 ILCS 105/27.2a(k)(4), it is ordered that:

1. The court states that it is reiterating that it is declining to hear the constitutional challenge because the constitutional challenge was not part of, and is collateral to, the underlying products liability lawsuit.
2. The motion to remove document from the record is denied on the basis that the court lacks the authority to allow it.

Atty No.: 99500

Name: B. Mann
Attorney for: Plaintiff
Address: 7261 N. Campbell
City /Zip: Chgo 60645
Telephone: 773-465-4587

Enter: Judge Susan Zwick
Nov. 20, 1998
Circuit Court – 1617
Judge Judge's No.

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants-Appellees.

Nos. 99-1750 & 99-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September 19, 2001

Before:

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

Order

The response to our order to show cause spends a great deal of time expressing dissatisfaction with the rulings of both state And federal courts in this case, but it does very little to justify the filing of three Federal lawsuits seeking review of decisions made in, or matters, affecting, a products-liability case ongoing instate court. To the extent the response offers explanations (such as ignorance of *Pennzoil* and the Tax Injunction Act), these are not justifications. Counsel is obliged to research the law before filing suits. We therefore conclude, for reasons narrated in our order of August 31, 2001, that attorney Mann has multiplied the litigations unreasonably and vexatiously, and must personally pay the costs and legal fees that resulted.

The statement of costs and fees submitted by the defendants is modest. They seek compensation for only 28

hours of legal work, which covers proceedings in both the district and this court. The hourly fee requested, $185, is appropriate to practice in Chicago.

Accordingly, and on the authority of 28 U.S.C. § 1927, Beverly Mann is ordered to pay $5,180.00 to the Office of the State's Attorney of Cook County. This amount must be paid within 14 days, and proof of payment must be filed with the clerk of this court.

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants-Appellees.

Nos. 99-1750 & 99-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October 16, 2001

Before:

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

ORDER

The following are before the court:

1. **NOTICE TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND/OR REQUEST FOR LEAVE TO FILE RULE TO SHOW CAUSE, FILED ON OCTOBER 11, BY COUNSEL FOR THE APPELLEES.**

2. **RESPONSE TO NOTICE TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND/OR REQUEST FOR LEAVE TO FILE RULE TO SHOW CAUSE, FILED ON OCTOBER 15, BY THE APPELLANT PRO SE.**

On September 19, 2001, this court ordered the appellant Beverly Mann to pay $5,180.00 to the Office of the State's Attorney of Cook County within 14 days and file proof of payment with the clerk of this court. To date, the appellant has failed to make the required payment. The clerks of all federal courts in this circuit are directed to return unfiled any papers submitted either directly or indirectly by or on behalf of Beverly B. Mann unless and until she pays in full the sanction that has been imposed against her. In accordance with our decision in Mack, exceptions to this filing bar are made for criminal cases and for applications for writs of habeas corpus. Beverly B. Mann is authorized to submit to this court, no earlier than two years from the date of this order, a motion to modify or rescind this order.

United States District Court
Northern District of Illinois
Eastern Division

Beverly B. Mann JUDGMENT IN A CIVIL CASE

v. Case Number 98 C 8004

Dorothy Brown, et al

Jury Verdict. This action came before the Court for a trial by jury. The issues have been Tried and the jury rendered its verdict.

- **Decision by Court. This action came before the Court. The issues have been tried or heard and a decision has been rendered.**

IT IS HEREBY ORDERED AND ADJUDGED that there being no Federal Jurisdiction, this case is hereby dismissed.

Michael W. Dobbins, Clerk of Court

Date: 10/19/2001

Wanda Parker, Deputy Clerk

In the
United States Court of Appeals
For the Seventh Circuit

In re: Beverly B. Mann	)
	)
Nos. 99-1750 and 99-3595	)

(Corrected) Response to Rule to Show Cause

This court has issued a Rule to Show Cause why I should not be ordered "to satisfy personally the excess costs, expenses, and attorneys' fees incurred because of" the conduct the court alleges in its Rule 53 Order. Much of that conduct allegedly occurred in my underlying state-court products liability lawsuit, which stemmed from my use of the prescription drug Halcion, manufactured and marketed by The Upjohn Company, the defendant in that litigation.

But the Rule 53 Order's summary of procedural rulings and events in the underlying state-court lawsuit contains numerous significant factual inaccuracies. E.g., I did not file the initial products-liability lawsuit in federal district court; Upjohn removed it there. And the lawsuit was voluntarily dismissed in federal court upon motion by my attorney at the time, Paul R. O'Malley, for reasons utterly unrelated to discovery: O'Malley wanted to add a defendant, my prescribing physician, whose joinder would destroy federal diversity jurisdiction and allow the case to be heard in state court where he wanted it heard. The dismissal order itself explicitly provided for leave to refile in state court within 60 days adding the physician as a defendant.

Discovery was not a controversy at that early stage, much less the reason for the voluntary dismissal. Nor was I ever barred as a discovery sanction from presenting any

particular evidence, nor ever threatened by the court with a discovery sanction of any type.

I won't even bother to point out that under 28 U.S.C. §451, the term "court of the United States" as used in §1927 refers only to federal court, not to state court, and that §1927 doesn't authorize a federal court to impose sanctions based in part on events (even real ones) that occurred in state-court litigation. Not even when the federal court liquefies the two lawsuits into one for purposes of dismissing the federal case.

But I do recommend the issuance of a Miranda-type warning, something like: Every-thing you say or that someone says about you in state court can and will be used against you in a federal appeals-court of law. In the 7th U.S. Circuit appeals court, anyway.

Some of this court's inaccuracies about the underlying case are adopted or construed (and in two important respects misconstrued) from the state appellate court's still-unofficial opinion,[1] which itself contains numerous misrepresentations about the contents of certain court orders and about certain other procedural events. These are distortions so stark that they approach outright fabrication; e.g., certain motions that the opinion implies were granted actually were denied (and the reverse), and the opinion represents specific judicial

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[1] I filed an affidavit with the appellate court advising that I plan to file a petition with the Illinois Supreme Court pursuant to Supreme Court Rules 317 and 315. There are several points, but what entitles me to review as a matter of right under Rule 317 is that the appellate court failed to review the merits of the summary judgments entered on three counts well before the remaining counts were dismissed for want of prosecution, the propriety of which implicates due process and equal protection guarantees. I attach a copy of the 20-page Petition as Exhibit 1.

findings as directly contrary to actual statements in written memorandum orders.

An easily illustrated example is the opinion's statement that "[o]n January 28, defendant filed a motion to have facts deemed admitted based on plaintiff's failure to answer defendant's request for admissions." Indeed Upjohn did file such a motion, but the motion was denied because it was established that due to an error by a substitute secretary during Christmas week, Upjohn's lawyers didn't serve me with a copy of the request and I didn't know of it until I received notice of the motion; the substitute secretary to the attorney responsible for mailing copies of *several* documents that were filed on December 27 had failed to include in the envelope a copy of the request for admissions.

The envelope did include a summary judgment motion, to which I responded *before* Upjohn filed its motion on the request for admissions, and a large set of interrogatories (Upjohn's eighth set, I believe, after several were stricken upon my motion), to which I also had responded – by answering some of them and *successfully* objecting to others – before Upjohn filed its admissions-motion. After Upjohn's admissions-motion was denied, I promptly filed a blanket objection to the entire request. The objection was *sustained* and the request, like several earlier ones, was stricken.

The incident was irrelevant to the appeal and was included in the opinion solely to mislead that the motion was granted rather than denied.[2] *Both* parties in that lawsuit timely

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[2] This court plays a similar game, e.g., in its throwaway reference to the $100 sanction Judge Leinenweber imposed, the unelaborated mention of which misleads that the sanction concerned the substance of the lawsuit and that it was imposed after the issuance of the Rule's required formal notice and opportunity to respond in writing, and that it was justified. But I had *appealed*

objected to various discovery demands. Neither party's discovery objections were ever ruled frivolous. In 1996 and '97, I moved *successfully* to strike one after another after another set of interrogatories/requests for admissions – each set containing approximately 200 interrogatories and a very substantial number of generic requests for admissions, which Upjohn served routinely in Halcion litigation. My *sustained* objections: that these discovery requests were redundant of earlier-completed discovery, that they were vexatious, and that they were served in violation of an Illinois Supreme Court Rule limiting the number of interrogatories to 35 without leave of court. I also moved *successfully* to quash several subpoenas (including one seeking a copy of my law school records, which I learned of only when an attorney for the University phoned me and asked whether I wanted the school to contest the subpoena on my behalf and on the school's.)[3]

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from the sanction order, which (if only in theory) barred this court from presuming without examination that it was appropriately issued.

[3] Another of the subpoenas was for the deposition of my sister's former husband, a gynecologist who after graduating from Northwestern University Medical School in 1969 moved with my sister to Denver, where he completed his medical training. He has never practiced medicine anywhere but Denver, and I have never lived in Colorado, yet Upjohn said it needed his deposition because I might have seen him as a patient. I had not claimed gynecological injury from my use of Halcion, nor do I have a medical history of gynecological problems. My sister and her former husband, incidentally, were divorced in 1975, and she and her current husband have lived in Seattle since 1987. Suffice it to say I easily had her ex-husband's subpoena quashed – as I did a deposition subpoena served on her current husband, who has never lived in Chicago, and a deposition subpoena served on my other sister's husband, who has lived (with my sister) in Houston since 1983.

As for the subpoena for my law school records, the notice of it was sent to O'Malley's office, but O'Malley didn't know about it because (incredibly, in my view) neither he nor his associate

Upjohn wanted to depose everyone I had ever known (well, there *were* a few of my former kindergarten classmates whose names did not appear on their deposition list). And in August 1997, I moved successfully to quash a mass effort by Upjohn to secure via *written* "evidence deposition" the testimony of virtually every physician I had ever seen; it wasn't quite clear how, exactly, I was to attend the *written* evidence depositions.[4]

The federal judge's voluntary-dismissal order had required that I respond within a specified time (14 days, I think) to a lengthy set of interrogatories Upjohn had served upon me shortly before the dismissal. I happened to be out of town at the time, and O'Malley faxed me the interrogatories, which I answered and then Fed Ex'd back to him. (The notary's stamp on my answers read "King County, WA.") Yet no sooner was the lawsuit refiled than did Upjohn's lawyers serve me with another lengthy set of interrogatories. O'Malley objected on the grounds that they were almost entirely duplicative of the ones I already had answered. The objection was not sustained, I was ordered to answer the

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routinely reviewed subpoena notices; the office receptionist was instructed simply to place those notices in the appropriate case file upon their receipt. It was this incident, in June 1996, that caused my already strained relationship with him to sever.

[4] "Evidence deposition" is a term of art, and something of a misnomer, in Illinois law. It differs from a discovery deposition (a *non*-evidence deposition?) in that its supposedly sole purpose is as verbatim trial testimony and, with limited exceptions, objections not made during an evidence deposition are deemed waived at trial. Discovery depositions, by contrast, under Illinois law cannot be used as verbatim trial testimony. Evidence depositions are allowed only by court order, the grounds for which must be the anticipated unavailability of the witness at trial, a circumstance that Upjohn did not (and *could* not) claim regarding even a single one of the targeted deponents. And for obvious reasons, there is no rule in Illinois permitting *written* evidence depositions.

interrogatories, and I did. No sanction of any type was issued then, or – I reemphasize – at any other time in that litigation.

No, most of the controversy in that litigation – and the one that ultimately caused me to request that the case be dismissed for want of prosecution – concerned not any failure to provide information in discovery but my failure to *retain paid opinion witnesses*, which I maintained I did not need in order to prove my case. The controversy, in other words, was not about my failure to *disclose* witness's identities or to produce documents but about my failure to *pay* opinion witnesses.

That was it, pure and simple. And should this court doubt this, I am providing in an accompanying appendix a copy of the Table of Contents and the Points and Authorities table from my opening brief in that appeal. And I can provide on disk or in hard copy all four briefs filed in that appeal, if this court would like.

The *paid*-opinion-witnesses issue also was the subject – the *only* subject – of the petition for temporary restraining order I filed in federal court in October, 1997, that so enrages this court.

It also was a central part of my appeal, although as is so typical of appellate opinions the state-court opinion doesn't mention it. Instead it cites a litany of allegations and presents them inaccurately as sustained by the trial court, apparently on the legal premise that any accusation a defendant makes against a pro se plaintiff is by definition accurate, at least when removed from its context (as most of the enumerated items are). But almost none of the items was addressed in the briefs to that court, and since the court knew of the allegations it also knew (or should have known) of my responses to them, and of the trial court's determinations concerning the allegations, and of the reasons for the trial court's determinations, none of which buttressed the opinion's premise.

For example, the court utterly misrepresented the nature and significance of one ruling by writing, "On February 19, the trial court granted defendant's motion to bar fact witnesses." The intended inference, of course, was that *all* my fact witnesses were stricken. But that is nonsense. The motion was a typical pretrial motion seeking to bar certain named trial witnesses. I no longer recall the details, but *by no means all* of my fact witnesses were stricken; I think only two of them were. And I had some of Upjohn's witnesses stricken, too.

In *most* litigation about to proceed to trial, names of witnesses are stricken on pretrial motion. So, the hell, what? This wasn't an issue on appeal and therefore was not addressed in the briefs. The court mentioned the February 19 order because it wanted to mislead; an honest recounting of it, as with an honest recounting of so much else in that case, would have been pointless or, worse, self-defeating.

That court perverts into parody the legal construct that appellate courts can affirm upon any grounds found in the record. As does this court, it redefines the phrase "grounds found in the record" as any statement that appears in any document in the record, however unsupported and even if overtly rejected by the trial court. It designates the defendant's lawyers as factfinder, as the lawsuit's diarist, as the font of true observation, and whatever they write may properly be adopted, unexamined, by the court.

And any sentence in a court order can be extracted, in or out of its context, and adopted unscrutinized and without elaboration, as needed. This court knows the routine: The trial court entered summary judgment/a sanction order/a discovery order/a … order; therefore the summary judgment/the sanction order/the discovery order/the … order is affirmed."

Or: The trial court entered summary judgment/a sanction order/a discovery order/a … order; therefore an order that *piggybacked on* the summary judgment/the sanction order/the discovery order/the … order is affirmed.

No need to examine the truth of the allegation or the propriety of the foundational order even when it is being appealed.

I call it a house-of-cards, although in criminal-law lingo I think it's known as a Ponzi scheme.

Most astonishing about the state-court opinion is the extraordinary degree to which that court freelanced through the huge (and expensively prepared) court record, recasting utter irrelevancies in a starkly false light.[5] I address some additional instances in detail in Exhibit 1, attached.

But of more immediate importance is that *this* appeals court in its Rule 53 Order makes several key errors, particularly concerning Illinois law regarding: (1) the *appealability* of two orders (which this court erroneously calls judgments) entered in the state-court case respectively on September 28 and November 19, 1998, on the file-preparation-fee matter; (2) whether under Illinois law my fees-challenge lawsuit and the underlying products-liability one really are the same case and therefore a replay of *Pennzoil v. Texaco*; (3) whether Illinois appellate courts have the authority to waive or reduce the file-preparation fee; (4) the effect of a denial by the Illinois Supreme Court of a Rule 381 petition, and the resulting effect on the issue of comity; and

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[5] I include in the appendix my two three-page motions concerning the attorney-eye-surgery incident that that court calls inexcusable. This court can, if it wishes, read the motions and draw its own conclusion.

(5) the constitutional structure in Illinois for *funding* the county and appellate courts.

This court also misconstrues the nature of my federal constitutional challenge. I think that in part this is because the court misapprehends Illinois' constitutionally-determined funding structure for the courts; the graduated ceilingless fees are paid *not* to the state, although it is the state *alone* that funds the trial and appellate court systems, but to the counties, which fund *no part* of the court systems. And in part it is because no judge or court-staff member read my briefs – which, incidentally, did address the funding-structure question. (Had the Rule 53 Order's author read my briefs he would know, for example, that I did pay the $1,635 record-preparation fee – not to the state but to the county, as per the law I was challenging. Although the state alone funds the courts it plays no role whatsoever in the collection *or use* of the fees, a primary basis for my lawsuit. So much for this court's contention that the Cook County State's Attorney's office failed to assert certain defenses because it did not have the interests of the *state* at heart; the state *had* no interest at heart, but the county did.)

Instead, a law clerk was assigned to summarize my arguments as filtered through the *appellees'* briefs, as is standard procedure for appellate review, or faux appellate review, in pro se civil lawsuits. A foolproof strategy for an appellee contesting a pro se appeal is to not even mention the appellant's strongest arguments; it works every time.

Or so, as a frequent filer, is appears to me.

I. The Fee-Challenge Lawsuit

This court misunderstands the essential premise of my federal lawsuit, which is that a graduated, ceilingless appellate fee determined by the size of the court record irrespective of

the relevance of most of the record to the issues being appealed, and paid *not* to the state (which *alone* funds the county court systems in Illinois) but instead to the county itself (which pays *nothing* toward the cost of running the court system), irrationally requires appellants whose court files are large to pay unduly to support the *county* government albeit *not* the state government and therefore *not* the trial or appellate court system.

A. Under Illinois law, the September 28 and November 19, 1998, state-court orders on the fee challenge were not appealable.

This court derides my claim that the September 28 and November 19, 1998, orders issued by Cook County Circuit Judge Susan Zwick were not final orders with res judicata effect. Deride though it might, this court presumes incorrectly; under Illinois law those orders were not appealable and they had no legal effect other than to bar the fee-challenge from being litigated as part of the products-liability lawsuit.

This court attributes to Judge Zwick its own view, which ridicules my fee-challenge motions as an inappropriate effort to convert the products-liability case into some new constitutional claim. Ridicule though it does, the court misconstrues the nature of Judge Zwick's orders as determined by Illinois law. Zwick found my motions inappropriate not because they asserted a constitutional challenge to the record-preparation fee for appeal in the products-liability lawsuit but because under Illinois law the constitutional challenge could be brought *only in a separate lawsuit*. And under Illinois law, as long as there exists the option to file a separate lawsuit, such orders *are not appealable*. See, e.g., by analogy, *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, N.E.2d 338 (1998), holding that orders denying motions to vacate

dismissals for want of prosecution are not appealable as long as the plaintiff could refile within one year under 735 ILCS 5/13-217.

The motion I presented at the September 28 hearing was to compel the release of the already-prepared record on appeal. It invoked specific provisions of the Illinois state constitution but not the United States Constitution. Judge Zwick expressly *declined to consider* the constitutional challenge to the statutory subsection at issue, 705 ILCS 105/27.2a(k)(4). *She said I would have to file another lawsuit in order to challenge the constitutionality of the fees statute.* She also said she knew of no statute or Supreme Court Rule other than Rule 298 that would allow her to compel the release of the record without the payment of the preparation fee. As per normal procedure there, I drafted the order. I wrote that the motion was denied.

At the November 20 hearing, the motion I presented to Zwick requested the severance of portions of the record for preparation for appeal. The motion sought alternatively a finding that the fees statute violates three provisions of the Illinois state constitution. That motion, like the earlier one, included no federal constitutional claim.

But it did include a section titled "The Procedural and Jurisdictional Basis for this Motion," which read:

> As Mann understands it, there are essentially two methods by which the constitutionality of a statute may be challenged. Anyone with legal standing to challenge the statute (i.e., anyone in reasonably imminent danger of suffering harm because of the statute) may do so by filing an independent proceeding with a court; e.g., a petition for mandamus or prohibition. If the statute pertains to litigation, persons who are litigants in a proceeding effected by the statute may also file a motion seeking relief

from compliance with the statute via a finding that the statute is unconstitutional.

It was the latter method that was employed recently to obtain a court ruling finding particular sections of the Illinois Tort immunity Act, and ultimately the Act itself, unconstitutional. To wit: *Kunkel v. Walton, et al.*, No. 81176 (Nov. 20, 1997); *Best v. Taylor Machine Works,* Nos. 81890, 81891, 81892, 81893 cons. (Dec. 18, 1997); *Hettinger v. Krah*, 95 L 601(not a Cook County case)....

.... In *Kunkel, supra.*, and *Hettinger, supra.*, for example, the plaintiff filed a personal injury lawsuit and then challenged the section of the Tort Reform Act requiring the plaintiff to allow the defendant indiscriminate access to the respective plaintiff's lifetime medical records without regard to their relevance to their lawsuit, upon sanction of dismissal of the lawsuit. The plaintiffs each challenged the constitutionality of the statute, not collaterally in a different court proceeding but directly in motions brought within their respective underlying lawsuits.

The ultimate relief they sought was the ability to proceed with their lawsuits without complying with the statutory mandate that they waive all rights to medical privacy. The avenue by which they obtained such relief: a finding by the court (the circuit court, affirmed on appeal) that the statute at issue violated Article I, Section 2, of the Constitution of the State of Illinois. The court declared the statute unconstitutional, thus granting them the ultimate relief they sought; they were allowed to proceed with their lawsuits without indiscriminately waiving their medical privacy rights.

In *Kunkel* and *Hettinger*, the plaintiffs could obtain the ultimate relief they sought simply by a single action of the court. Once the court found the challenged statute

unconstitutional, the court allowed the lawsuits to proceed without the statutorily mandated waivers.

The judge *agreed* with my premise. She read aloud a paragraph from an Illinois Supreme Court opinion (I think it was from *Kunkel*) which said the trial judge has the discretionary authority to exercise jurisdiction to hear constitutional issues collateral to the litigation. She said she was exercising her discretionary authority to decline to exercise jurisdiction to hear the constitutional challenge, partly because the County was not a defendant in the products-liability case. (Their counsel did appear at the hearing, but only because I had requested her presence.) Again the judge told me to "file another motion." She also said I had misconstrued her earlier ruling when I drafted the September 28 order: She had not denied the constitutional challenge; she simply had declined to exercise jurisdiction to hear it. And she denied my request for severance of portions of the record. She dictated the precise language for the order, which reads:

1. The court states that it is reiterating that it is declining to accept jurisdiction to hear the constitutional challenge because the constitutional challenge was not a part of, and is collateral to, the underlying products liability lawsuit.
2. The motion to remove documents from the record is denied on the basis that the court lacks the authority to allow it.

Her two orders, as they concerned the constitutional challenges, were similar in nature to ones that sever some counts in a complaint or that deny a discretionary joinder motion, orders that are non-appealable, at least under Illinois law, as long as no substantive rights are affected. Orders that, even if appealable, *are not judgments* and do not bar the

litigation of the issues in a separate lawsuit if that is the choice of the litigant.

Judge Zwick neither intentionally nor inadvertently precluded my right to litigate the issue. She just denied me the forum of the products liability case in which to litigate it. By reading from (I think) *Kunkel*, she said she *could* have exercised jurisdiction to hear the matter but that she *chose* not to. She never suggested that she thought I was making an inappropriate effort to convert the products-liability case into some new constitutional claim. She said I *had* a constitutional claim, *stemming* from my appeal in the products-liability lawsuit, but that she would not hear the claim as *part* of the products-liability lawsuit although she *could* if she chose.

This court, citing *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), writes, "This suit could have been dismissed on preclusion grounds; a disappointed litigant must appeal, rather than file another suit, even if developments after entry of the first judgment show that the decision was incorrect."

But under Illinois law *there was no judgment* – none whatsoever. There was only an order declining to accept jurisdiction to hear the fee-challenge as part of the products-liability case. This court's citation to *Moitie* follows immediately the court's reference to my Rule 60(b) motion in 98 C 6078, and I'm not sure whether the *Moitie* citation is intended as a res judicata finding on the dismissal of 98 C 6078 as well as on Judge Zwick's orders. But 98 C 6078 was dismissed not on the merits but on jurisdictional grounds that no longer existed by the time I filed 98 C 8004, and *Moitie* finds a res judicata bar only to the refiling of a claim already decided on its substantive merits. *Moitie* barred only my relitigation of the jurisdictional issue on which the district judge based the judgment in 98 C 6078, and I was not trying to relitigate that issue, which no longer was relevant.

This court's Rule 53 Order puzzles me with its citation to *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985), to support its sneer that "federal courts are entitled to abstain on their own … to protect themselves from impositions of the kind that Mann has perpetrated." Nearly every paragraph of *Mazanec* undermines this court's premise.

For example, *Mazanec* treated as a threshold question the appealability of an abstention order in the jurisdiction where it was issued. And after noting that in this circuit (where the abstention order was issued in that case), orders granting abstention are appealable as final orders and orders denying abstention before final judgment are not appealable, that opinion commented that the latter are no more final than are orders denying motions to dismiss under Fed. R. Civ. P. 12(b)(6).

In my case, Zwick's abstention orders were no more final than was the order at issue *S.C. Vaughan Oil Co.* I know of no Illinois legal authority that suggests otherwise.

If this court does, it should cite to me that authority and allow me to address it before I am sanctioned for litigating the fees issue in federal court. I did discuss in the federal litigation the question of issue-preclusion, in the documents I filed with the district court (see the first paragraph of Section C below) and in my appellate briefs.

I did not ignore the issue; this court ignored what I wrote about it.

This court chides the State's Attorney's office and Judge Leinenweber as well as me for our collective failure to see an issue-preclusion bar. But the State's Attorney's office is familiar with "the preclusive effect of an Illinois state court judgment" and with what "that state's res judicata

requirements" are, see *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285 (1992), as is Judge Leinenweber, a former Illinois state legislator and chair of a legislative committee that drafted Illinois' completely revamped civil practice statutory scheme in 1982. As was I in the fall of 1998, when I litigated the matter.

Which is why none of us found Judge Zwick's September 28 order as amended by her November 19 order, nor her November 19 order itself, a judgment with res judicata effect under Illinois law. Or under Illinois law a judgment at all.

B. This court holds inexplicably that Art. III standing to challenge the constitutionality of a state court-fees statute itself bars a federal constitutional challenge in federal court, an untenable and circular legal position.

This court also questions Judge Leinenweber' s belief that I was challenging the constitutionality of the fee statute itself rather than the state judicial system's application of the statute to my appeal. But this court appears to base its conclusion on this point solely upon my Art. III standing to challenge the fee statute, an untenable and circular legal position.

In my brief in 99-3595 at p. 4, I wrote, "The statute applies to all types of cases, including criminal, dissolution of marriage, child custody, adoption and probate, as well as to personnel injury and products liability lawsuits." I had written the same in my brief in 99-1750 and in most of the documents I filed with the district court.

And in my brief in 99-3595 at pp. 30-31, I wrote in a section titled "The Public Has a Strong Interest in Providing Access to Appellate Review Irrespective of a Party's Financial Ability to Pay a Four-Figure Tax":

The public has a substantial interest in the ultimate determination of the constitutional issues presented in this lawsuit. As Mann noted above, the fees schedule at issue applies in every type of litigation in Illinois state court, civil and criminal. Mann does not challenge the district court's premise that litigants must be prepared to pay the reasonable expenses of litigation. She does challenge the constitutionality of a statute that requires litigants to pay litigation expenses that are neither reasonable nor inherently necessary but, rather, artificially erected by the government.

Civil litigation is almost always very expensive. Hourly attorneys' fees have a market rate set mainly by large corporate clients and are virtually always in the three-figure-per-hour range. Court reporter fees also are substantial; court reporters attend approximately two years of school to gain the special skills that enable them to perform their service and then must purchase the very expensive equipment and (these days) computer software necessary to their job, and their fees reflect this. These are non-artificial (if not always reasonable) expenses of litigation.

But the district court's premise is preposterous that this justifies the government's assessment of the artificial fees at issue in this lawsuit.

Mann also believes that the fees schedule creates and inherent conflict of interest for attorneys representing clients upon a contingent-fee arrangement. In such circumstances, the attorney usually has agreed to pay the expenses of the litigation during its pendency and to deduct those expenses from the eventual monetary reward, if any. It seems likely to Mann that the prospect of a prerequisite court-fees payment of perhaps thousands of dollars may

impact upon the advice the attorney gives the client regarding the advisability of appeal.

Having silently conceded the inevitability of a chasm between the actual stated grounds in a pro se civil appeal and what (after translation by a law clerk) passes as the court's summary of it, this type of thing no longer jolts me; I expect it of the court, and the court doesn't disappoint.

But the threat or imposition of sanctions (and certainly of sever ones, as this court plans to impose on me) are another matter entirely. Particularly so given that this court apparently bases its sanctions assessment partly on my standing to challenge the fee statute – not on my lack of it but on my possession of it.

The court says (as I understand it) that standing to challenge the fee statute operates as a nearly irrebuttable presumption that the constitutional challenge concerns the statute's application only to that plaintiff's underlying case. Only if the plaintiff must pay the fee in order to appeal from an already issued judgment does she have standing under Art. III to challenge the fee's constitutionality. And because she is challenging the fee's constitutionality by virtue of the assessment of the fee in her appeal, she is presumed to be challenging its constitutionality only as applied in her case.

The presumption can be rebutted (presumably) only by filing a petition for class certification. But I lacked the funding and the legal expertise to litigate a class action. So according to this court I was not challenging the statute's constitutionality but only its constitutionality in my situation.

No matter that a finding of unconstitutionality in my situation effectively would have stricken the statute *in all situations*, just as occurred in *Kunkel* and *Taylor Machine Works*. It was not the nature of my claim but my failure to

seek class status for it that bars my access to federal court and that subjects me to sanctions for proceeding with the matter in federal court.

How absurd.

The fee statute is neither vague nor susceptible of varying interpretations depending upon the circumstances – even less so, in fact, than was the statute in *Mazanec*. If the fee statute was unconstitutional in my case it was unconstitutional – period. Which is exactly what I argued to the district court and to this court, e.g., at pp. 26-27 of my brief in 99-3595, where I wrote:

> Because Cook County reaps a substantial monetary windfall as a result of §105/27.2a(k)(4), the subsection is, by definition, a general-revenue tax upon what is a very small subgroup of county residents: appellants in cases in which there is a large court record. No legitimate governmental purpose exists for the levy of this general revenue tax.
>
> For Mann, this statute has required her to pay approximately $1,400 (the amount of her payment beyond the approximate cost to the county of the preparation of her court record for appeal) to support the general expenses of county government. There is no connection between the requirement of this payment and any legitimate justification for it.
>
> The basis for this constitutional challenge obviously does not rest upon the financial resources of the appellant; it is equally available to any appellant whose court record is large, irrespective of the litigant's net worth, whether a homeless person living on the curbside of lower Wacker Drive, or Beverly Mann, or Abra Rockefeller Prentice.

Nor, incidentally, did I arbitrarily select the $150 that the court says I was willing to pay, but no more. The $150 amount was selected for me; it's the initial amount that pursuant to another subsection of the statute must be paid. The subsection I was challenging kicks in as a per-page ceilingless fee if the court file is larger than 200 pages. I challenged that subsection but not the one that assesses the $150 fee. Had the latter subsection assessed a $250 fee or $500 fee or even a $750 fee, I'd have paid it. But no more.

C. Under Illinois law, my federal lawsuit and the underlying one are not the same case and therefore not a replay of *Pennzoil v. Texaco*.

In my amended complaint and mandamus petition, I quoted the following from *Retired Chicago Police Assn. v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993):

> To assess the preclusive effect of an Illinois state court judgment, therefore, we must apply that state's res judicata requirements. Under Illinois law, an action is barred by res judicata when there exists: "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies." *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 602 N.E.2d 820, 825, 176 Ill. Dec. 874 (Ill. 1992); see also *Welch v. Johnson*, 907 F.2d 714, 720 (7th Cir. 1990) (stating same).

Irrespective of whether this court agrees with me that Judge Zwick's September 28 and November 19 orders were similar to ones that sever some counts in a complaint or that deny a discretionary joinder-motion and that they therefore did not bar litigation of the fees issue in a separate lawsuit, and setting aside the matter of identity of causes of action between the products-liability lawsuit and the fees-challenge lawsuit, it is

indisputable that there existed no identity of parties or their privies in the federal and state-court actions.

Nor does this present a merely technical, and therefore perhaps insufficient, distinction between my cases and *Pennzoil v. Texaco*, the case this court finds determinative. The bond at issue in *Pennzoil*, and the statute that required its payment, were solely for the benefit of Pennzoil, not for the benefit of the government entity to which the bond would be paid. The bond money represented the monetary judgment that was to be appealed, and the government entity would hold the bond money in escrow *solely for the benefit of Pennzoil*, which had won the judgment.

It is no artifice to note that the petitioner to the Supreme Court in *Pennzoil* was, well, Pennzoil, not the government entity to which the bond was to be paid. The government entity was neither a party nor a party-in-interest to that proceeding; it had no financial or other interest in the outcome of the Supreme Court case. Indeed the *Pennzoil* opinion begins:

> The principal issue in this case is whether a federal district court lawfully may enjoin a plaintiff who has prevailed in a trial in state court *from executing the judgment in its favor* pending appeal of that judgment to a state appellate court.

The issue in *Pennzoil* concerned the procedure for executing the monetary judgment awarded *to Pennzoil* at trial, specifically whether the procedure for executing the judgment implicated a federal constitutional right. But in my fees-challenge case the real party-in-interest was not Upjohn, the appellee in the products-liability case, but Cook County, the government entity that not only would collect the fee but would *use* the fee. And *did* use the fee; the county has not paid and will not be paying Upjohn the $1,635 I paid to it for the preparation of the court record.

So how is this a replay of *Pennzoil*? And, more to the immediate point, why should I be sanctioned in light of *Pennzoil* for filing the federal lawsuit? Other than that this court likes to sanction people for the sake of sanctioning people, that is.

As for Judge Zwick, she was right (for once) in ruling against me. (She was right *all* the time when she ruled *for* me.) I had relied upon *Kunkel*, *Taylor Machine Works* and *Hettinger* for my proposition that she did have jurisdiction to hear the fees-challenge. But the statutes at issue in those cases (particularly in *Kunkel* and *Hettinger*) were for the sole benefit of private civil defendants in such cases, not for the benefit of the state or other government entity. And as the names of those cases denote, just as the name of *Pennzoil v. Texaco* denotes, it was not the government but the defendants in the tort actions who were the parties in interest as well as the parties in name.

Although Zwick said she had the option to accept jurisdiction on the fees challenge, and although at the time I certainly agreed with her interpretation of the law on that, I no longer think she even had the option to hear it, given that it was the county and not Upjohn whose interest was at issue in the fees matter. I think the appropriate analysis would be analogous to that in considering discretionary-joinder motions. And at least unless the county was being joined as a party, a joinder motion would have to have been denied.

D. Illinois appellate courts have no authority to waive or reduce the file-preparation fee

Although this court says otherwise, there is no Illinois rule that enables an appellate court to waive or reduce the file-preparation fee as this court claims. I, at least, know of none, and that is not for lack of trying. Unable to find one myself, I inquired of the deputy chief clerk at the appellate court clerk's

office (Steven Ravid, who this year became that court's clerk) and was told no such procedure exists. As this court notes, Illinois Supreme Court Rule 298 provides for petitions to be presented to the trial court and also strictly limits eligibility for that relief. Another Rule permits the severance of some documents from the remainder of the record to allow their preparation for appeal, but it requires the discretionary approval of the trial judge or agreement of the appellee. I presented such a motion to the trial judge but Upjohn contested it successfully on the grounds that neither of its appellate attorneys had been involved in the case at the trial-court stage and they would need the entire record when drafting their briefs (these were cross-appeals).[6] The wording of the Rule suggests that such a motion could be presented also to the appellate court, but when I told Upjohn's local appellate counsel – Thomas Fegan, a longtime Illinois appellate specialist – that I planned to file one he said the appellate court could not entertain motions under that Rule.

Fegan is the author of a book on Illinois appellate procedure, and I checked his book's discussion of the Rule (I don't recall which Rule it was) to verify that he thought this. The book confirmed it and cited supporting case authority.

E. An exhaustion-of-state-constitutional-remedies prerequisite would divest federal courts of original jurisdiction to hear any federal due process or equal protection claim against any government in Illinois, or at least would divest it of original jurisdiction to hear any such challenge to an Illinois statute.

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[6] This sounds like a transparent excuse to ratchet up the cost to me of the appeal, but it was not. At virtually the same time, Upjohn's lawyers provided me with copies of transcripts of about 25 hearings at $.20 per page, the same rate they charge their clients, saving me more than $2,000 in court-reporter fees.

Article I, Section 2, of the Illinois state constitution mirrors the Fourteenth Amendment's due process and equal protection clauses. It was the primary state-constitutional provision I asserted in the motions Judge Zwick declined to hear, and in my Rule 381 petition that the Illinois Supreme Court declined to hear. It reads:

> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

If the existence of that or any other constitutional provision requires federal court abstention in my fees-challenge lawsuit, then they would do the same in other cases challenging Illinois statutes. *But they don't.*

This court's opinion in *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000), begins with: "Two licensed taverns in Chicago appeal from the district court's dismissal of their suit to enjoin an Illinois state statute pursuant to which the plaintiffs would have lost their licenses had they not been granted preliminary relief that continues on appeal. The statute, 235 ILCS 5/9-1 et seq., is challenged both as depriving the plaintiffs of their property without due process of law and as a bill of attainder." It ends with: "So the issue 'is not too much delegation, but delegation to the wrong body: delegation of judicial decision-making, for example, to people who are not judges.' [Citations omitted.] That is what Illinois has done and what the due process clause prohibits."

No fear expressed there of unwarranted determination of federal constitutional questions. Nor in *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995 (7th Cir. 2000).

The federal constitutionality of Illinois statutes are challenged in federal district court just as the federal constitutionality of other states' states are challenged in

federal district court even when those states' constitutions have provisions that mirror the federal constitutional provision cited. And they proceed through federal district-court and appellate resolution on their merits.

While I was litigating my fee challenge in federal district court, the U.S. Supreme Court issued its opinion in *Saenz v. Roe*, 526 U.S. 489 (1999), in which it affirmed a ruling by the 9th U.S. Circuit Court of Appeals that struck a California welfare-benefits statute as violative of several clauses of the Fourteenth Amendment, including the equal protection clause. The district court in *Saenz*, like the 9th Circuit, had ruled on the merits of the federal constitutional issues, including the equal protection issue.

The Supreme Court in its opinion in *Saenz* did not mention a state-constitutional-grounds exhaustion requirement, and I don't know whether California's constitution has a provision similar to the Fourteenth Amendment's equal protection clause and to the Illinois constitution's Art. I, sec. 2. But I do know this: that on the date that the Supreme Court decided *Saenz*, a virtually identical lawsuit then on appeal before *this* court was based on an Illinois statute indistinguishable from the one in *Saenz*, and that the appellant was not the plaintiff but the state of Illinois. The district court had found that the statute violated the Fourteenth Amendment – this notwithstanding the existence of the state constitution's Art. I, sec. 2, and that the plaintiff was complaining about the effect of the statute on *her*. See *Hicks v. Peters*, 98-3696 (7th Cir.).

I quoted from *Saenz* to the district court and in my briefs to this court (in 99-3595 at p. 29, in 99-1750 at pp. 36-37). The law clerk assigned to this appeal must have missed it.

This court writes in its Rule 53 Order that it examined the briefs and record in my appeals and concluded that oral argument was unnecessary. But, with the exceptions only of

the issue-preclusion question and the state-court-funding-structure matter, both of which I discussed above, none of the issues on which it based its decision and its sanction was briefed to this court, nor even argued to the district court. I requested oral argument – although I admit I really didn't want it. But at least at oral argument I would have learned that my appeals would be determined in a vacuum, upon cascading unscrutinized presumptions that I had no reason to foresee. I could have – and would have – requested leave to file a supplemental brief addressing them, albeit one that (like the others) no one would have read anyway.

I'm writing that brief now, instead of meeting deadlines on a variety of other matters, only some of them related to my avocation as a frequent filer. But I'm not sure why. I've already lost my appeals, and this court already has decided to sanction me. It makes no difference what I write here.

Just as it made no difference what I wrote in my formal briefs. I could have written anything. I could have confessed to murder (and did, at p. 19 in 99-3595). I could have recited nursery rhymes (pp. 7-9 in 99-1750). I could have excerpted pages from the phone book (pp. 10-18 in 99-3595). I could have divulged a purloined nuclear secret (p. 37 in 99-1750). It was all the same. As it will be again.

F. A petition pursuant to Illinois Supreme Court Rule 381 gives Illinois the "first crack" at the issue and therefore satisfies the *Pullman*-doctrine prerequisite.

Much of this court's Rule 53 Order reads to me like a shell game. It skewers me for bringing the fees-challenge to federal court instead of presenting it to the Illinois courts. But it also disparages me for petitioning the Illinois Supreme Court to hear the case pursuant to a Supreme Court Rule explicitly designed to provide quick adjudication of such issues. And it

notes gleefully that the Supreme Court promptly denied my petition to consider the issue, yet it orders the district court to abstain from the matter because, it says, I didn't bring the matter to the Illinois courts.

This court cites *Mazanec* to support sanctions against me, but *Mazanec* says, "no useful purpose would be served by abstaining in this case. The main purpose of the *Pullman* doctrine is to avoid, if possible, declaring a state statute unconstitutional, by giving the state courts a chance to interpret it narrowly. [Citations omitted.]" *Mazanec* also says "there are two requirements for abstaining under *Pullman*: some risk that the statute will be found unconstitutional unless narrowed; some reasonable chance that it can be narrowed through interpretation." But apart from this court's rumination about the former, the latter chance is nonexistent; the statute sets the fee, a ceilingless fee of $.25 per page.

This court says I wasn't challenging the fee as unconstitutional for anyone but me. But (even aside from the portions of my brief quoted above that do exactly that in unequivocal terms) the court's assertion is a logical impossibility.

I had never heard of the Tax Injunction Act. But apparently neither had the State's Attorney's Office nor had the district judge. And *Mazanec*, which this court cites in support of sanctions, ends with this:

> At the risk of supererogation, we add a final reason against abstention: the state did not ask for it until the end of the trial. We mentioned this point earlier in connection with delay; but it is also an independent argument against abstention. It is true that abstention can be ordered even if neither party requests it at any stage of the proceedings, [citations omitted] – and this may seem surprising: if the state does not want the protection that the doctrine affords

it, why should the federal court extend the doctrine affords it, why would the federal court extend that protection to the state anyway? The answer is that "the state" is not an individual, but a collectivity. State attorneys general (who usually are elected officials, rather than appointees (who usually are elected officials, rather than appointees of the governor) may not have the same interests as other organs of state government; nor may local officials; and federal court should not get involved unnecessarily in what may be intramural struggles of state government even if invited to do so by one of the contenders. But if the responsible state officials are willing to litigate the case in federal court, that court does not have to force it back into state court. [Citations omitted.] These state officials were willing.

My Rule 381 petition – this court's derision of it notwithstanding – accommodated the need for state comity and satisfied the requirement of the Tax Injunction Act.

And when contending parties invoke the process of the federal courts, it becomes the unsought responsibility of those courts to resolve the federal and constitutional issues the judicial system has been forced to confront. See *Bush v. Gore*, 121 S. Ct. 525 (2000). This court shirked its responsibility to consider my fees challenge, and veils that truth under a pious sanction order.

Conclusion

Much of this court's Rule to Show Cause relies upon the factually erroneous statement in the state-court appellate opinion that the trial court had issued several sanctions orders were issued against me. On September 18, I filed with the Illinois Supreme Court an Appeal as of Right and, alternatively, a Petition for Leave to Appeal, in which I address that issue at various points in her Petition to the

Illinois Supreme Court, but particularly in several paragraphs on p. 16, one of which reads:

> Illinois Supreme Court Rule 219 is titled "Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences." Sec. (c) requires that "[w]here a sanction is imposed … the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." No such sanctions order was entered in this litigation.

I attach to this Response as Exhibit 1 a copy of that 20-page Petition. The Petition addresses all of the matters this court raises about the manner in which I litigated the state-court products liability lawsuit.

I also note an opinion that this court issued earlier this week in *Downey v. State Farm Fire & Casualty Co.*, No. 00-3473 (7th Cir. Sept. 17, 2001), in which the court said it believed initially that no federal jurisdiction existed (the ultimate basis for this court's Rule to Show Cause issued against me) but provided the plaintiff with two opportunities to address the jurisdictional question, first at oral argument and then in a supplemental brief. This court concluded then that federal jurisdiction did exist in that case.

I received in the mail today, September 19, in an envelope postmarked September 18, a copy of the Defendants' Estimate of Total Expenses, which they say amounts to $5,180.00, a very steep sanction, particularly given the absence of any earlier indication that there even existed a jurisdictional issue. In this light, I ask that this court accord me a hearing of the sort provided under F.R.A.P. 46(c) so that I can try to convince it *that* I believed, and *why* I believed, throughout this litigation that federal jurisdiction existed in my fee-challenge lawsuit.

Respectfully submitted,

Beverly B. Mann
Respondent *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

September 19, 2001

*1999 U.S. Dist. LEXIS 13426, **

BEVERLY B. MANN, Plaintiff, v. AURELIA PUCINSKI, As Clerk of The Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants.

Case No. 98 C 8004

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1999 U.S. Dist. LEXIS 13426

August 3, 1999, Decided
August 3, 1999, Filed

OPINION BY: Harry D. Leinenweber

OPINION: MEMORANDUM OPINION AND ORDER

Before the court is defendants' motion to dismiss. Plaintiff Beverly B. Mann ("Mann"), *pro se*, sues Aurelia Pucinski, as Clerk of the Circuit Court of Cook County, Illinois and Cook County, Illinois, the municipality. Although suing *pro se*, Mann is a trained lawyer, and has brought numerous lawsuits in this District unrelated to the immediate lawsuit. Plaintiff challenges the constitutionality of a provision of the Illinois Clerk of Courts Act, which sets a fee of $ .25 per page for copying and transferring a circuit court record to the Illinois appellate court for court records over 200 pages. 705 ILCS 105/27.2a(k)(4). Specifically, plaintiff alleges that

Section (k)(4) of the Act violates Section 1 of the Fourteenth Amendment to the U.S. Constitution [*2] and Article I, Section 2, and Article IX, Section 12 of the Illinois Constitution.

BACKGROUND

The court is intimately familiar with this case as it has produced a fairly extensive procedural history, including one prior lawsuit. Briefly, the procedural history is as follows. Mann originally filed a federal lawsuit, Case No. 98 C 6087, styled not as a complaint but rather as a petition for a temporary restraining order and writ of injunction or prohibition to prevent the Illinois clerk of courts from imposing the statutory fee in Mann's state court appeal. Mann currently is appealing a decision issued by the state circuit court in her products liability suit against the Upjohn Company. Mann objects to having to pay the statutory fee, amounting to $ 1,543.75 in her case. This court held a hearing on Mann's motion for a Temporary Restraining Order but denied the motion and dismissed the case for want of jurisdiction. This court's reasons for finding a lack of jurisdiction were premised on the well-established rule in Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923) and District of Columbia Court of Appeals et. al. v. Feldman, et. al., 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). [*3] The rule, known as the Rooker-Feldman doctrine, prevents federal district courts from providing appellate review of state court decisions, as federal jurisdiction is strictly original and the correct avenue of appellate review exists in the state appellate court, the state supreme court and eventually the U.S. Supreme Court. In other words, this court has no subject matter jurisdiction over final decisions by the state courts. Id.; see also Garry v Geils, 82 F.3d 1362, 1364-1368 (7th Cir. 1996). Mann had filed a motion with the state circuit court seeking to have the circuit court clerk ordered to forego the statutorily mandated

fee for preparing the court record. In addition, Mann filed a petition for writ of mandamus with the Illinois Supreme Court, which was denied. In essence, Mann asked this court to review these state court decisions, which this court could not do under the Rooker-Feldman doctrine. Therefore, this court dismissed Mann's suit for want of jurisdiction. Following the court's dismissal of the lawsuit, Mann filed several subsequent motions attempting to establish this court's jurisdiction, including in chronological order: a motion to vacate the judgment [*4] order, a motion to reconsider, a second motion to reconsider, a second motion to vacate the judgment order, a motion for leave to file an amended petition for writ for mandamus or prohibition, and another motion to reconsider. All of these motions were denied.

Subsequently, Mann brought this second lawsuit to continue her quest to obtain copies of the circuit court record without having to pay the statutorily-mandated fee. To remedy the jurisdictional defect existing in her prior federal suit, Mann argued that the circuit judge had not actually denied her motion ordering the clerk to waive the fee, but that the circuit judge had declined to consider it. On the basis of this argument and after determining that the Illinois Supreme Court had declined leave to file the mandamus action, this court found that Mann had cured her jurisdictional defect. Having established jurisdiction, Mann initiated this suit by bringing a "Motion for Hearing on Petition for Writ of Mandamus and Prohibition." This court, finding no federal statutory authority to issue a writ of mandamus forcing the clerk to issue the circuit court record to Mann free of charge, denied her motion. Mann responded by filing [*5] a Motion for a Temporary Restraining Order. Incidentally, before this court ruled on Mann's motion for a temporary restraining order, Mann attempted on at least two occasions to file emergency motions for leave to amend her complaint before other fellow judges in this district, both of which were

denied. This court subsequently denied Mann's motion for a temporary restraining order. At that point, Mann filed a Motion for Leave to File an Amended Joint Complaint, which the court granted, and a Motion for Preliminary and Permanent Injunction. After briefing on these motions, the court denied Mann's motion in a Memorandum Opinion and Order. See Mann v. Pucinski, No. 98 C 8004, 1999 WL 135305 (N.D. Ill. Mar. 3, 1999). Following this memorandum opinion and order, Mann filed an Emergency Motion for Reassignment in front of Judge James B. Zagel. After deciding the motion was not the proper subject of an emergency, Judge Zagel ordered Mann to present the motion for reassignment in this court. Mann then presented her "Motion for Judicial Recusal," pursuant to 28 U.S.C. § 455 and Motion to Vacate the Order Denying a Preliminary Injunction, which this court [*6] denied. Thereafter, Mann filed a Notice of Appeal from this court's orders denying her motion for judicial recusal and to vacate the order denying a preliminary injunction and the court's memorandum and opinion order denying her motion for a preliminary injunction. Thereupon the defendants brought a Motion to Dismiss Mann's amended complaint and amended joint complaint, which is the motion immediately before the court. n1 In short, Mann has shown no shortage of creativity or tenacity in seeking her desired relief.

----------Footnotes----------

n1 As a side note, Mann also thereafter filed a Motion for Sanctions Pursuant to Rule 11, which the court denied. And in addition, Mann filed another case in federal court arising from the same state court suit against Upjohn, seeking an injunction against Cook County Circuit Court Judges O'Connell, Cohen, Cox and Bastone from denying her a request for a trial continuance, which Judge Plunkett denied.

----------End Footnotes----------

PUBLISHER'S NOTE:

Page(s) App F5-F9 missing in original.

[*15] and costs, $ 75.

(3) Court appeals when original documents are forwarded, over 100 pages, plus delivery and costs, $ 150.

(4) Court appeals when original documents are forwarded, over 200 pages, an additional fee of 25 cents per page.

705 ILCS 105/27.2(a) (West 1999). Mann contests Section (k)(4) only.

In ruling on Mann's motion for a preliminary injunction, this court partially analyzed the constitutionality of Section (k)(4) and determined that Mann had virtually no chance of succeeding in bringing her state and federal constitutional claims. See Mann v. Pucinski, 1999 U.S. Dist. LEXIS 2804, No. 98 C 8004, 1999 WL 135305, at **1-4 (N.D. Ill. March 3, 1999). This court found that Illinois does not treat certain litigants more favorably than others (except indigents - in that a waiver of the fee is available under Supreme Court Rule 298 for indigents), nor does it impose any insurmountable impediments to civil litigants in order to carry on an appeal. Id. at *2. The court concluded also that there is nothing irrational or arbitrary about imposing a fee on users of the court system in order to provide financial support for that same court system. Id. at *3. The court [*16] found numerous cases affirming the constitutionality of statutory fees under the Illinois Constitution. Id. The court read and still reads these state court decisions as foreclosing Mann's claim under the Illinois state constitution and to hold that under the Illinois Constitution, fees must be used to support the court system and the legislature need not first ascertain the actual cost of a service when establishing the fee. Id.

As for Mann's federal constitutional claims, after further

briefing the court is convinced that Mann's claims must fail. Under Mann's asserted facts, the fee imposed by Section (k)(4) does not violate her rights to equal protection or procedural due process as a matter of law. Although the Constitution guarantees no right to appellate review, once a State affords that right, that right must be provided equally. Griffin v. Illinois, 351 U.S. 12, 18-24, 76 S. Ct. 585, 590-93, 100 L. Ed. 891 (1956). The Illinois rule challenged in Griffin deprived most defendants without means to pay for a transcript access to appellate review. Id. The Supreme Court has navigated the basic rule in Griffin, that appellate review may not be [*17] denied by a party's inability to pay, taking into specific account the underlying stakes of the case. M. L. B., Petitioner v. S. L. J, Individually and as Next Friend of the Minor Children, 519 U.S. 102, 103, 117 S. Ct. 555, 556, 136 L. Ed. 2d 473 (1996). The Supreme Court has interpreted Griffin to mean that equal access to appellate courts without regard to a defendant's ability to pay is more narrowly confined to cases where imprisonment is at stake or where the conduct is quasi-criminal in nature. M. L. B., 519 U.S. at 103, 117 S. Ct. at 556. In addition, the Supreme Court "has also recognized a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees. Id. (citing Boddie v. Connecticut, 401 U.S. 371, 374, 91 S. Ct. 780, 784, 28 L. Ed. 2d 113 [divorce proceedings]). Making clear, however, that a constitutional requirement to waive court fees in civil cases is the exception, not the general rule, and the Court has refused to extend Griffin to the broad array of civil cases." Id. (internal citations omitted); see also United States v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) [*18] (statutory requirement of payment of filing fees as condition precedent to obtaining discharge in bankruptcy has a rational basis and does not deny indigents equal protection of the laws); Ortwein v. Schwab, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973) (Oregon appellate filing fee, as applied to indigents seeking to appeal an adverse welfare decision, is not

violative of the due process or equal protection clause of the Fourteenth Amendment). The limited exception to this rule denying a constitutional waiver in run of the mill civil cases is for civil cases involving state controls or intrusions on family relationships, for example, in parental termination appeals, where the family association "'of basic importance in our society' is at stake." Id., 519 U.S. at 103, 117 S. Ct. at 556-57.

Under Griffin and its progeny, the court concludes that Mann's underlying lawsuit is a run of the mill civil case, to which the constitutional waiver of court fees does not apply. As a product liability lawsuit, the special interests advanced in most criminal cases and in rare civil cases, such as where choices about marriage, family life or the upbringing [*19] of children must be made, are not implicated here. Id.

The court further finds that a rational basis exists for the fee in Section (k)(4). Mann argues that there is no rational basis alleging that the fees in Section (k)(4) are not used to support the appellate courts, the fee discriminates against the class of appellants whose litigation has garnered a large court record, and the fee greatly exceeds the cost to the county of providing the service at issue. First, the court summarily dismisses Mann's notion that the $ .25 per page fee over 200 pages is disproportionate to the actual charge and that it is excessive. Mann's cost per page, $ .25, is a bargain compared to the charges the Supreme Court has identified as within a reasonable range for similar statutory appellate transcription fees. M. L. B., 519 U.S. at 139, 117 S. Ct. at 575 (Thomas, J., dissenting generally to the majority's main holding that an indigent is entitled to free transcripts in civil cases where fundamental familial rights are implicated) (Mississippi's $ 2 per page charge "falls comfortably within the range of charges throughout the Nation." citing inter alia Ariz.Rev.Stat. Ann. § 12-224(B) [*20] (1992) ($ 2.50/page); Mass. Gen. Laws § 221:88 (1994) ($ 3.00/page); S.C.App.Ct. Rule 508 ($ 2.00/page)). As for Mann's contention that the fee

discriminates against the class of litigants who have amassed long court records, the court finds that the class identified by Mann as being discriminated against hardly could qualify as a classification attracting heightened scrutiny under the equal protection clause. Such classification is reserved for suspect classifications, such as race, for example. See e.g. Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). And the Supreme Court "'has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.'" Id., 448 U.S. at 323, 100 S. Ct. at 2691 (internal citations omitted). Moreover, "the State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement." M. L. B., 519 U.S. at 123-24, 117 S. Ct. at 567 (internal citations omitted). On its face, like similar transcription fees, the purpose of the fees in Section (k)(4) is to offset the costs of preparing the appellate record. The fact that [*21] long transcripts are more costly to the court system and that the legislature imposed a per page fee is further evidence the purpose of the statutory section is to offset the costs of preparing a long record. It stands to reason that under a flat fee scheme the clerk's office would lose money the longer the record. Thus the court finds a rational basis for the statutory fees in Section (k)(4), that of offsetting the fees of transcription. Mann also contends that there is no rational basis because the fees are not directly earmarked and used to fund the appellate courts, but rather, Mann contends the fees are collected and deposited into the general Cook County fund and are used for the general operation of county government. However, the issue of whether the fees are used for purposes unrelated to the costs of operating and maintaining the courts has been raised, found to be unsubstantiated, and rejected by the Illinois courts. See Zamarron v. Pucinski, 282 Ill. App. 3d 354, 357-60, 218 Ill. Dec. 23, 668 N.E.2d 186 (1996). Finally, the court notes that the fact that a waiver is available to indigents under Rule 298 is further basis for this court to find a rational [*22] basis for the statutory fee. The fact that Mann, who purports to be of limited means, has not applied

for such waiver, remains puzzling to the court if in fact Mann is serious about seeking appellate review.

Mann requests that a writ of prohibition be issued barring defendants from enforcing 705 ILCS 105/27.2a(k)(4). Because Mann's claims fail on their merits, this request is denied as moot. On July 12, 1999, Mann filed a motion to supplement the record on appeal with her Response to Defendants' Motion to Dismiss Plaintiff's Amended Complaint and Amended Joint Complaint and its exhibits, filed for purposes of this motion to dismiss. Mann states she filed her opening brief in her appeal on July 7, 1999. Mann's motion to supplement the record on appeal is granted.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted. Mann's request for a writ of prohibition is denied as moot. Mann's motion to supplement the record on appeal is granted.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court
Date: August 3, 1999

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court. The issues [*23] have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the motion by defendants' to dismiss is granted.

Date: 8/3/1999

Following are the first four pages (the first three sections) of Mann's Petition to the Illinois Supreme Court in *Beverly B. Mann v. The Upjohn Co.*, No. 92383, scheduled for ruling on December 5:

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1. Appeal as a Matter of Right and Alternative Prayer for Leave to Appeal

Petitioner, Beverly B. Mann, a nonpracticing attorney *pro se*, appeals to this Court as a matter of right from the decision of the Illinois Appellate Court, First District, Third Division, in which that court affirmed without review the 735 ILCS § 5/2-1005 entry of summary judgments on several counts and the 735 ILCS § 5/2-619 dismissal of another count, affirmed without review the denial of a735 ILCS § 5/2-1005(g) motion for leave to file amendments to the complaint, and affirmed on the basis of a series of supposed sanctions orders existing *nowhere in the record* (no such orders were entered!) the denials in violation of 735 ILCS § 5/2-1007 of motions for a single three- or four-month trial-date continuance and the denial (in violation of this Court's precedent) of a 735 ILCS § 5/2-1301 motion.[1]

That court's denial of any appellate review of the orders granting the defendant's § 5/2-1005 and § 5/2-619 motions and of orders denying Mann's § 5/2-1005(g) motion violated several state and federal constitutional provisions: the due process and equal protection provisions of the Constitution of the State of Illinois (Art. I, sec. 2) and of the Constitution of the United States (the Fourteenth Amendment), the Illinois Constitution's scheme of separation

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[1] Someone – presumably a law clerk – foraged through the 26-volume file and extracted disjointed sentences and titles from the appellee's motions (almost none of which even were mentioned in the briefs because the parties considered them irrelevant). Incredibly, the Appellate Court misrepresents these as *findings* by the trial court.

of powers between the legislative and judicial branches (Art. II, sec. 1), the Illinois Constitution's conferred right to appellate review (Art. VI, sec. 16), and the United States Constitution's conferred right to jury determination of issues of fact in most common-law civil lawsuits seeking monetary damages (Seventh Amendment).

As did that court's unexplained affirmance of the stated policy of the Cook County Law Division, as per former Chief Judge Donald P. O'Connell's arbitrary directive, that requires as a prerequisite to the grant of trial-date-continuance motions the designation of *paid* opinion witnesses.

Mann had repeatedly challenged that policy as violative of constitutional due process and equal protection precepts and as contrary to 735 ILCS § 5/2-1007, and the issue was central to much of her appeal. The Appellate Court's failure to consider these challenges amounts to a tacit finding that Illinois circuit courts can ignore at will the specific dictates of a state statute, in seeming derogation of Illinois' constitutional separation of legislative and judicial powers established in Art. II, sec. 1. Alternative to her appeal as of right, Mann prays for leave to appeal.

2. Proceedings Below

The judgment of the Appellate Court was entered on June 29, 2001. A Petition for Rehearing was filed on July 20, 2001, and was denied in an order entered on August 14, 2001. An affidavit of intent to file a petition for appeal as a matter of right and, alternatively, for leave to appeal was filed on August 23, 2001.

3. Statement of the Points Relied Upon for Reversal

A. The Appellate Court refused to consider Mann's appeals from summary disposition pursuant to 735 ILCS §§ 5/2-1005 and 5/2-619 of several counts in her complaint, holding without explanation and without any apparent authority that Mann *was not entitled to appellate review* of those dispositive orders because her remaining counts ultimately were dismissed for want of prosecution. But the subsequent dismissal for want of prosecution of the counts

that had remained after summary interlocutory disposition on other, unrelated counts does not – and constitutionally cannot – operate as an arbitrary bar to appellate review of the earlier dispositive orders.

B. The Appellate Court's summary narration includes such profound and seemingly systematic error – including (stunningly) a litany of claims that certain orders were issued that were not issued and that certain motions were granted when actually they were denied (and the reverse) – that the erroneous narration approaches outright fabrication of the court record. The effect is of a house-of-cards, of a Ponzi-like scheme in which affirmances are piggybacked upon nonexistent orders or upon utter irrelevancies recast in a starkly false light, of a clear denial of appellate review.

C. Instead of examining the propriety of trial-court orders from which Mann had appealed, the Appellate Court (even when summarizing them accurately) simply reported what the trial court had ruled and said nothing further about them, but they were used as the basis upon rulings other than that they provided the basis upon which to affirm other orders – as though the fact of a ruling itself justifies its affirmance.[2] It's simply a circular and therefore empty exercise, and doesn't meet even minimal standards of due process and equal protection. It's a shell game, not genuine appellate review.

D. Mann was told *repeatedly* by the small cadre of Law Division judges who, at the behest of (recently retired) Chief Judge Donald P. O'Connell, ruled on trial-date-continuance motions that there were two prerequisites to trial-date-continuances upon motion and that Mann had not met those prerequisites: she had not designated a paid opinion witness and she had not taken a sufficient number of

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[2] E.g., the court noted accurately that the trial court had denied Mann's motion to amend the complaint in order to add certain counts, deeming those counts too similar to ones on which summary judgment earlier was granted. But Mann had *appealed* from that order, and so the mere recitation of the trial court's stated grounds for the ruling (even when summarized accurately) doesn't constitute meaningful appellate review.

depositions and she therefore was deemed lacking in due diligence. But these prerequisites conflict with 735 ILCS § 5/2-1007 and violate state and federal constitutional guarantees to due process and equal protection of the law; they amount to a steep court-access fee, the lack of payment of which results in denial of access to trial. And the appellate court's failure to consider these challenges amounts to a tacit finding that Illinois circuit courts can ignore at will the specific dictates of a state statute, in seeming derogation of Illinois' constitutional separation of legislative and judicial powers.

E. The trial court treated Mann's trial-date-continuance motions as though they were *Upjohn's* summary judgment motions, insisting that Mann prove *the sufficiency of her evidence* as a prerequisite to relief. Mann argued to the trial court and on appeal that the spontaneous transformation of her trial-date-continuance motions into Upjohn's sufficiency-of-evidence motions contravened § 5/2-1007 and denied her the procedural and substantive due process required for such motions.

F. The Appellate Court in affirming the denial of Mann's § 5/2-1301 motion failed to undertake the analysis that this Court has said is required, and instead ruled based upon *utter irrelevancies* – employing a remarkably curious cut-and-paste technique in selecting its references to the record. The Appellate Court, as did the trial court, analyzed her motion not under the standards for § 5/2-1301 motions but for § 5/2-1401 motions.

In the
United States Court of Appeals
for the Seventh Circuit

In re: Beverly B. Mann	)
	)
Nos. 99-1750 and 99-3595	)

(Corrected) Motion for Stay of Issuance of Mandate so as to Enable the Filing of, and Ruling Upon, a Motion for Rehearing (and Rehearing en banc) re: September 19, 2001, Sanctions Order

Petitioner Beverly Mann moves this court to stay the issuance of the mandate in this matter so as to enable her to file, and obtain a ruling upon, a Motion for Rehearing (and Rehearing en banc) regarding the sanctions order issued on September 19, 2001. She plans to file her motion for rehearing no later than September 25, only four business days after the order was issued and three business days after she received a copy if it.

The sanctions order stems from a Rule 53 order issued on August 31 in which this court resolved the appeals and issued a *sua sponte* rule to show cause. None of the assertions upon which the court based its rule to show cause was addressed or even asserted previously in the litigation, yet the court ordered the appellees to submit an estimate of total expenses (including hourly attorneys' fees) by the date that Mann's response to the rule to show cause was due. In her

motion for rehearing, Mann will argue that the grounds for the September 19 sanctions order appear to differ significantly from the court's stated grounds for the issuance of the rule to show cause. She also will argue that she has been denied the procedural due process for the issuance of sanctions that this court in *In re Hancock*, 192, F. 3d 1083 (7th Cir. 1999), and in *In re Rimsat, Ltd.*, 212 F.3d 1039 (7th Cir. 2000), has said is required, at least in that she has had no opportunity whatsoever to address the sanctions order's assertions of law and an erroneous interpretation concerning her comments about *Pennzoil* and the Tax Injunction Act. The sanctions order says:

> The response to our Order to show cause spends a great deal of time expressing dissatisfaction with the rulings if both state and federal courts in this case, but it does very little to justify the filing of three federal lawsuits seeking review of decisions made in, ***or matters affecting***, a products-liability case ongoing in state court. To the extent the response offers explanations (such as ignorance of *Pennzoil* and the Tax Injunction Act), these are not justifications. Counsel is obliged to research the law before filing suits.

She will argue that with due respect the first of those assertions is erroneous and the second is irrelevant given her challenge to the *relevance* of *Pennzoil* and the Tax Injunction Act (the latter which this court itself said in its August 31

order probably is irrelevant, albeit for reasons that differ significantly from those Mann has asserted). She submitted a 17-page, single-spaced response to the rule to show cause, all but the first five pages of which address the legal issues concerning *the availability to her* under Illinois law of the forum of the products-liability lawsuit, and the *appealability* under Illinois law of the state-court judge's order, both facially and in conjunction with the state-court judge's instructions to "file another lawsuit." The state-court order read in material part:

> The court states that it is reiterating that it is declining to accept jurisdiction to hear the constitutional challenge because the constitutional challenge was not a part of, and is collateral to, the underlying products liability lawsuit.

This court had premised its rule to show cause upon a presumption that under Illinois law the state-court order constituted a judgment and was an appealable order. But Mann argued elaborately and with citation to Illinois Supreme Court authority, in eight single-spaced pages in her response, that neither premise was accurate. And she distinguished her situation from that in *Pennzoil* not only in that regard but also in that, in *Pennzoil*, the parties to the statute-challenge were identical in both name and actual interest to those in the underlying lawsuit, and that the *Pennzoil* matter concerned the

execution of the judgment in favor of the Pennzoil. In Mann's situation, the state-court judge explicitly *held* that the fee-challenge was *not* a part of the underlying lawsuit.

In its sanctions order, this court holds for the first time either that the state-court judge interpreted Illinois law erroneously in this regard or that Illinois law is irrelevant to the federal subject-matter jurisdiction. (Mann is not clear which.) But the court offers no explanation for either (apparently alternative) legal premise and Mann does not know any basis for either.

The upshot of this court's stated rule of law would be that Mann had *no forum at all* in which to litigate the fee challenge. She could not litigate it as part of the products-liability lawsuit because the trial judge in that case declined jurisdiction to hear it. She could not appeal from that order because under Illinois law the order was not an appealable one. And (according to this court) she could not bring a separate lawsuit challenging the fee, whether in state or federal court – the state-court judge's instruction notwithstanding – because the fee-challenge matter could *affect* the products-liability case, an erroneous statement of fact given that Mann's appeal was *not* dismissed for failure to pay the fee (she paid the fee).

And as for the Tax Injunction Act, Mann indeed said she was unaware of it. But she also said explicitly and in an entire separate section of her Response that even if pertinent to this matter, the Act's requirement was satisfied by her filing of an Illinois Supreme Court Rule 381 petition to the Illinois Supreme Court, a Rule designed specifically for that purpose.

This court based its *sua sponte* rule to show cause upon several erroneous premises of Illinois law and an important premise of federal constitutional law from which, at least if Mann reads the sanctions order correctly, this court now retreats: that there exists a requirement of exhaustion of state-court constitutional remedies before a statute (or municipal ordinance) can be challenged in federal court as violative of the federal constitution. (In her response, Mann cited several opinions, but two others now come to mind because they arose in Illinois and challenged codified law, yet were considered by this court on the merits of their Fourteenth Amendment due process and equal protection grounds, and were then considered by the Supreme Court on their merits without inquiry into the availability of a state-constitutional challenge.

But this court appears to base its actual sanctions order, the order of September 19, solely upon a finding that Mann's legal research was remiss. There is a particular irony

in this, given that this court's own *sua sponte* rule to show cause was premised on unresearched and erroneous propositions of law (certainly with respect to Illinois law).

More important, though, Mann's unawareness of *Pennzoil* and the Tax Injunction Act is irrelevant unless that opinion and that Act properly control the outcome. Mann has argued, credibly, that they do not. And unless they so clearly should control the outcome that no reasonable attorney could believe otherwise, sanctions against Mann are no more justified than would be sanctions against any other attorney arguing a case that does not turn upon a legal question of first impression. The sanction against Mann in these circumstances invokes the so-called British "loser pays" rule for which there is no legal authority either in Illinois or in this circuit.

Mann pleads that she be allowed to file her motion for reconsideration and obtain a ruling on it before this court issues the mandate in this matter.

Respectfully submitted,

Beverly Mann
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

In the
United States Court of Appeals
for the Seventh Circuit

In re: Beverly B. Mann	)
	)
Nos. 99-1750 and 99-3595	)

Emergency Motion for Clarification Concerning the Motion to Stay Issuance of Mandate and, Alternatively, Motion to Recall the Mandate

Petitioner Beverly Mann moves this court to clarify whether the delay in issuing the mandate was intended to allow her to file a motion for rehearing concerning the September 19, 2001, issuance of a sanctions order against her as she had requested via emergency motion filed on September 21. (She filed a corrected draft on September 28.) The first paragraph of that motion read:

> Petitioner Beverly Mann moves this court to stay the issuance of the mandate in this matter so as to enable her to file, and obtain a ruling upon, a Motion for Rehearing (and Rehearing en banc) regarding the sanctions order issued on September 19, 2001. She plans to file her motion for rehearing no later than September 25, only four business days after the order was issued and three business days after she received a copy if it.

The motion was denied on October 1 in an order stating that the mandate will issue forthwith, but at this writing it has not yet been issued. Mann completed her motion for

rehearing shortly after she filed her emergency motion to stay the mandate, but she did not file it because the court had not issued an order granting her motion. Now she wonders whether the court delayed issuing the mandate in order to allow her to file her motion, and has denied her motion because she did not file the motion. If so, she would like leave to file it, and if not she moves to recall the mandate in order to allow her file the motion.

In her draft motion for rehearing, she notes in addition to the grounds she summarized in her September 21/September 28 motion that Illinois' "savings" statute, 735 ILCS § 5/13-217, *allows her to refile this action in Illinois state court* once this court's mandate has issued and the district court dismisses the lawsuit under the abstention doctrine, this court has ordered. Thus if Mann is correct that under Illinois law, this lawsuit and the underlying products-liability case are considered two lawsuits rather than one, the basis for the sanction will be nullified, not only because the work performed by the State's Attorney's Office concerning the substantive issues in this case will be used in that lawsuit but also because the very premise of the sanction itself – that under Illinois law these were a single lawsuit rather than two – will be proved erroneous. (It is partly upon this basis that she will file an application with Justice Stevens for a writ recalling the mandate and staying the effect of the sanctions order, if, as

she expects, this motion is denied; this court, after all is alone among those involved in either the state-court or the federal-court case in finding that the two lawsuits really were one, and Mann will ask for a stay of the sanctions order not only until her certiorari petition is considered but also until the Illinois courts pronounce these matters one lawsuit or two.) The second paragraph of the earlier motion(s), which Mann reiterates here, read:

> The sanctions order stems from a Rule 53 order issued on August 31 in which this court resolved the appeals and issued a *sua sponte* rule to show cause. None of the assertions upon which the court based its rule to show cause was addressed or even asserted previously in the litigation, yet the court ordered the appellees to submit an estimate of total expenses (including hourly attorneys' fees) by the date that Mann's response to the rule to show cause was due. In her motion for rehearing, Mann will argue that the grounds for the September 19 sanctions order appear to differ significantly from the court's stated grounds for the issuance of the rule to show cause. She also will argue that she has been denied the procedural due process for the issuance of sanctions that this court in *In re Hancock*, 192, F. 3d 1083 (7th Cir. 1999), and in *In re Rimsat, Ltd.*, 212 F.3d 1039 (7th Cir. 2000), has said is required, at least in that she has had no opportunity whatsoever to address the sanctions order's assertions of law and an erroneous interpretation concerning her comments about *Pennzoil* and the Tax Injunction Act.

Mann respectfully asks that this court allow her to file her motion for rehearing, either before the mandate is issued or, if the mandate is issued before this court rules on this motion, via a grant of her motion to recall it.

Respectfully submitted,

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This article appeared in the December 8, 1994, edition of the Chicago Daily Law Bulletin. It is the article referenced in the Petition in a footnote on p. 22; a copy of it appears in the record on appeal two pages after the sticker-tabbed copy of the state-court order.

What's so nice about a convict's family?

By BEVERLY MANN

Criminal defense attorney David W. Gleicher, in his article "Sentencing with the Family in Mind" (Law Bulletin Nov. 30), discusses a recent opinion by the 7th U.S. Circuit Court of Appeals that appears to disband the federal sentencing guidelines for criminals, at least those of the white-collar variety, whose *family members* meet standards established by no one but the sentencing judge. The article bills the opinion as an advance in the administration of justice because it allows a variance in sentencing for criminals with particularly needy families.

If this were the extent of the new rule, it indeed would be such an advance, but Mr. Gleicher specifies that the single factual basis for the potential variance in the case that set forth the new rule is that the criminal has a nice family. His children, according to the opinion, are straight-A students, and these model children will suffer "substantially" and (horrors!) perhaps "irreparably" if their father is subject to the penalties that the law requires for those who committed the type of crime he committed. The law does allow for a sentencing variance in extraordinary circumstances, the court said, and the basis for the request for variance in the case they were deciding may qualify.

The federal sentencing guidelines, for all their controversy, do, when enforced, accomplish what was at least ostensibly their primary purpose. The guidelines themselves may be racially

and socio-economically charged, but they do serve to eliminate variations in sentencing based on the conscious or subconscious racial and socio-economic preferences of the sentencing judge. Or at least they did.

This recent opinion, U.S. v. **Marius Canoy, No.** 93-3315, is extremely important, Mr. Gleicher advises, and surely he is correct. "Now that family circumstances can be taken into account," he says, "it is imperative that the attorney review the client's family or community situation to determine whether it is 'extraordinary' enough to warrant a departure." Mr. Gleicher only thinly veils his recognition that the opinion in **Canoy** legitimizes precisely the practice that the sentencing guidelines pledged to end: the practice that places "extraordinary circumstances" squarely in the eye of the beholding district judge.

In light of the frivolous grounds that the **Canoy** opinion suggests may be potential justification for a variance of the sentencing guidelines, the opinion advertises this point. The basis for the District Court's determination that the circumstances of this defendant, a white-collar defendant, are extraordinary was neither dire family need due to illness or handicap of a family member nor any demonstrated concern by the defendant for the community as exhibited perhaps by acts such as donations to charity in money or time; neither circumstance apparently was present in this case. The basis was that this defendant has children of the type that any upstanding federal judge would be proud to have - children who likely resemble, at least in socio-economic status, the children of the sentencing judge.

The potential for use of such a criterion as subterfuge for socio-economic criteria, whether consciously or not, is obvious. The determining factor in the district judge's expressed wish to reduce this defendant's sentence may not have been *that* the

defendant's children are "A" students but *where* they are "A" students.

Mr. Gleicher specifies that the appellate opinion expressly gives broad discretion to the sentencing judge; the trial judge is in a better position to determine the criminal's family situation, the opinion states, and "any decision regarding the family ties departure by a district judge would be given much discretion by a reviewing court. " So "family values" is now officially a mitigating circumstance in the sentencing of white-collar criminals, at least in the 7th Circuit, as is a sentencing judge's belief that model children such as defendant Canoy's should have their heretofore model lives disrupted only minimally.

It is not only criminal defense attorneys who should take note of this opinion, as Mr. Gleicher advises, but anyone with a white-collar job and a nicely situated family. The court has altered the basis for the penalty for white-collar crime. The penalty henceforth will be determined not exclusively by the seriousness of the crime (and related issues) but also, probably, by the quality of the criminal's family members as perceived by the sentencing judge. Those in positions of status whose family members meet the pliable criteria apparently now permitted have a reduced risk of severe penalty for white-collar criminality; the gamble of such criminal conduct is lessened for them.

The federal justice system is downright permeated with deference to litigants who have a lofty social status. Some litigants themselves inherently hold the high status; large or mid-sized business entities and their executives, usually the defendants or defendant parties in interest in civil lawsuits, do. Other litigants who can afford to do so usually purchase the status by retaining as counsel an expensive and clout-heavy law firm, but few individuals can afford to do so.

Too bad for those who cannot. So entrenched in some federal courtrooms is this system of status-determined court rulings that the deference resembles an outright delegation of judicial

authority. Occasionally, judges accord this deference, or delegation, at the mere suggestion that someone or something important (a clout-heavy law firm, for example) has, for whatever reason, an interest in the outcome of the case.

The federal sentencing guidelines at least for a while undermined, if only in criminal cases, the aura of legitimacy that deference based on social status has enjoyed in federal court. The opinion in Canoy formally reinstitutes it in criminal cases. In civil cases, of course, it simply will continue to be the norm.

Beverly Mann, a licensed attorney who no longer practices law, is a freelance writer in Chicago.

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants-Appellees.

Nos. 99-1750 & 99-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October 1, 2001

Before:

Hon. Frank H. Easterbrook, Circuit Judge

ORDER

The following are before the court:

1. Emergency Motion for Stay of Mandate So as to Enable the Filing Of, and Ruling Upon, a Motion for Rehearing, (And Rehearing En Banc) Re: September 19, 2001, Sanctions Order;

2. Motion to Recall the Mandate and for Leave to File a Motion for Rehearing (and Rehearing En Banc) Re: September 19, 2001, Sanctions Order; and

3. (Corrected) Motion for Stay of Issuance of Mandate So as to Enable the Filing Of, and Ruling Upon, a Motion for Rehearing, (And Rehearing En Banc) Re: September 19, 2001, Sanctions Order.

It is ORDERED that #1 and #3 are DENIED. #2 is DENIED as unnecessary. The mandate in these appeals shall issue forthwith.

This article was written in August, 2000, for publication in an online legal journal but was not published. It is mention on p. 22 of the Petition.

ARTICLE

> *The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body.*
>
> *The Federalist No. 78*

Log onto the Web site of the Federalist Society For Law & Public Policy Studies and, there, just below the organization's logo featuring a silhouette of James Madison is the above passage.

Click on the highlighted link labeled "About the Federalist Society" and read the group's Statement of Purpose, which laments that "law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society."

It hadn't previously occurred to me that a form of orthodox liberal ideology is what underlies the ubiquitous phone-book-size summary judgment motions and the appellate briefs filed by mega-law-firm senior partners on behalf of their corporate clients, whom they bill at an hourly rate of $350 or more. The tobacco industry should request a refund from its litigation counsel.

(On a personal note, I have litigated, albeit not in tobacco-related litigation, against partners at the law firm that

for decades has served as the tobacco industry's lead national counsel, and they don't seem strongly dominated by anything other than their corporate clients' directives – incessant demands that suggest no form of orthodox liberal ideology familiar to me, an orthodox liberal ideologue born and bred. So it doesn't, after all, take one to know one; it's the converse that's true, I guess.)

In any event, the Federalist Society to the rescue.

Its Statement of Purpose advises that the association is founded upon several ideologically conservative legal precepts, including the one that holds that it is emphatically (the Statement's word) the province and duty of the judiciary to say what the law is, not what it should be. The Society, the Statement assures, aims both to "promote an awareness" of its stated tenets and to further the application of them through the organization's activities.

Not least among those activities, reading further (okay, reading between the lines), is its sponsorship of ideologically vetted candidates for the federal bench who, once sworn, will say that the law is what the Federalist Society thinks it should be, irrespective of what the law actually is.

Madison Avenue, eat your heart out. Or hire away the copy writer who penned that Statement of Purpose.

I happened upon the Federalist Society's Web page recently while researching a point for a book I am co-writing, and it spirited my mind back a few years to the day when I attended a luncheon meeting of that group's Chicago chapter. I had read earlier about that organization's remarkable co-optation during the 1980s of the federal judicial nomination process and its consequential fashioning of that bench in its own ideological image. So, curious about the Society's

methods, I ventured into enemy territory rented for the lunch hour, a latter-day Mata Hari in a business suit.

The featured speaker that day was 7th U.S. Circuit Court of Appeals Judge Michael S. Kanne, who unselfconsciously bragged that he recently had achieved the Federalist Society's equivalent of a hat trick (my phrase): Since assuming the bench a few years earlier, he had served as a luncheon-meeting speaker for each of the Society's local chapters within the 7th Circuit's three-state geographic perimeter. And, not content to rest upon those laurels, he was beginning an encore tour.

Greta Garbo, eat your heart out. Or don a navy pinstriped suit and spend a strategically chosen lunch hour at the Midland Hotel.

My recent research and consequent reading of The Federalist No. 78 coincided roughly with the issuance of Judge Kanne's opinion in a case called *Gile v. United Airlines* last May. The opinion affirmed a jury's verdict of $200,000 in compensatory damages to a fired employee of United Airlines for violation of the Americans With Disabilities Act and reversed the jury's verdict of $500,000 in punitive damages that was based upon a finding, as per the Act, that the defendant engaged in a "discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." Judge Frank H. Easterbrook concurred. Judge Diane P. Wood dissented from the reversal of the punitive damages verdict.

The opinion prints out at 13 pages, three full paragraphs (barely more than one page) of which is devoted to the reversal of the punitive damages award. (The remainder is an elaborately detailed apology to United Airlines for the court's affirmance of the compensatory damages verdict.) Quoting from the Supreme Court's 1999 opinion in *Kolstad v.*

American Dental Ass'n., Judge Kanne acknowledges that the statutory requisite of "malice or reckless indifference" depends upon the "employer's knowledge that it may be acting in violation of federal law." He then says that it is the province of the judge(s) rather than the jury to weigh the evidence concerning malice or reckless indifference, the explicit language of the ADA notwithstanding.

In the single paragraph in which the opinion states the court's reasons for reversing the jury verdict, the two-judge majority resolves one after another issue of fact in United's favor. "McGuffin believed that a shift transfer would not have accommodated Gile's disability." "McGuffin in good faith disagreed with Orlandino that a shift transfer would enable Gile to work and believed that Gile's psychological condition was a nonoccupational, personal problem which did not trigger any obligation under the ADA on United's part." "United did not regard her condition a disability …" "Although United wrongly believed that Gile was not disabled under the ADA and did not adequately address her accommodation request, United did not exhibit the requisite reckless state of mind regarding whether its treatment of Gile violated the ADA."

And so forth …

A petition filed by Gile's attorneys requesting rehearing by the entire 11-member court (known in legal lingo as a petition for *en banc* review) included detailed citation to the evidentiary record at trial, which showed that every one of those findings pertained to a contested issue of fact, and also indicated that a purported witness statement upon which the appellate court's opinion purports to rely exists nowhere in the trial record.

Surprise, surprise. Until, that is, you consider that overt misrepresentation of the evidentiary record in any

particular case is simply another method of deceit that federal appellate judges commonly employ (some judges routinely, others only occasionally) in manipulating the outcome of appeals. (Lawyers should see, e.g., Justice Scalia's angry dissent to the denial of Supreme Court review in *Lambert v. County of San Francisco*, issued Mar. 27, 2000, with Justice's Kennedy and Thomas concurring; also Judge Williams' dissent in *Malacara v. City of Madison*, 7th Cir., issued Aug. 18, 2000.)

And until, that is, you consider the importance of the generic issue of punitive damages in the current jockeying among Republican appellate appointees throughout the country to fill the two or three presumptively impending vacancies on the Supreme Court. The horses are out of the gate, and have been for about a year now.

Which is how the district judges within the 7th Circuit found themselves briefly last fall with the windfall legal authority to rewrite state abortion-prohibition legislation under the guise of what was called precautionary injunctions, courtesy of an opinion on behalf of a bare majority of the *en banc* appellate court in *Hope Clinic v. Ryan*, reversed last June by the Supreme Court.

Political media consulting firms, eat your heart out. Or hire away the strategist who wrote that opinion. His name is Frank H. Easterbrook, late of *Gile* in a supporting role, and he has perfected his skill to a science.

Turning his undivided attention now to the political constituency that pays his party's bills, that judge, in an opinion issued last month in a case called *Perez v. Z Frank Oldsmobile,* has placed upon federal judges the mandate to vacate a jury's punitive damages awards on whim – or, rather, on the basis of some economics formula determined (in what strikes me as the ultimate *ex parte* communication) by a

consortium that includes Nobel Prize-winning economist Gary S. Becker and law professors Cass R. Sunstein, Daniel Kahneman and David Schkade.

The days of mere stealth subversion of the civil law are over for that judge, who looks like a Civil War general and seems to think he is one. (For the Confederacy, I think.)

"Federal judges may, and should, insist that the award be sensible and justified by a sound theory of deterrence. Random and freakish punitive awards have no place in federal court, and intellectual discipline should be maintained," the general writes, immediately after citation to a renowned 1989 Supreme Court opinion called *Browning-Ferris Industries v. Kelco Disposal*, which, incidentally, holds (quoting from the Court's own published summary):

> Federal common law does not provide a basis for disturbing the jury's punitive damages award. In performing the limited function of a federal appellate court, this Court perceives no federal common-law standard, or compelling federal policy, that convinces the Court it should not accord considerable deference to a district court's decision not to order a new trial. The District Court in this case properly instructed the jury on Vermont law and applied the proper state-law standard in considering whether the verdict was excessive, and the Court of Appeals correctly held that the District Court did not abuse its discretion.

Only in modern federal court does the word "intellectual" serve as a synonym for the word "ideological."

Title that portion of *Perez* (for copyright purposes) *The Unbridled Judicial Authority Manifesto*. Or title it *Federal Judges Know Best*. I had thought before reading *Perez* that that judge has just been bucking for nomination to the Supreme Court, but now it appears that elevation to the

Supreme Court may be only his fallback ambition. I think he actually has his sights set a bit higher: on a Nobel prize for (law and) economics, although, given his spin on *Browning-Ferris*, he probably is more likely to receive a Pulitzer, in the category of works of fiction.

"Punitive damages should not be used as an escape hatch, subject only to the whim of judge and jury," he writes in *Perez*. No, but enforcement of punitive damages awards should be subject only to the whim of judges whose personal ambitions, political ideology or career-advancement debts trump established law.

And, speaking of escape hatches, that judge might want to examine his own and his colleagues' use of his court's own self-promulgated Circuit Rule 53, which is billed as a "Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States" but which actually is a plan for *non*-publication of judicial opinions. (That court did, after all, publish its opinions before its plan for publication first was published some two decades ago. Those rules, the subject of much controversy in legal circles, effectively establish appellate panels as *de facto* committees of monarchs, operating below the radar screen of the general news media and answerable to absolutely no one, provided that the monarchs play their cards with at least a modicum of skill.)

Madison Avenue, eat your heart out. As judicial escape hatches go, that Circuit's Rule 53 and the Rule's counterparts in the other federal circuits have proven mighty reliable ones – transparent devices by which proverbial trees growing deep in the forest fall with crashing thuds that no one who really matters can hear.

I hesitate to handicap the Supreme Court Stakes at so early a stage. The race is hard to follow, even with binoculars,

as several of the entrants are wearing the same-colored racing silks: red, white and blue, in honor of James Madison (in silhouette) and The Federalist No. 78. But with his roles in *Hope Clinic*, *Perez* and *Gile*, he surely has improved upon his gate position.

Easterbrook by a furlong? Too early to tell, but he certainly shows no sign of scratching from the race. And this may be the only derby in history in which at least one of the contestants changes his racing colors mid-contest, in this instance to a certain shade of deep green.

As for *Gile*, the petition for *en banc* rehearing was denied, with three dissenting votes, none of them from judges entered in the current Stakes.

The rehearing petition in the *Gile* case, filed on June 5, noted the imminence of what promised to be a defining Supreme Court ruling, in a case called *Reeves v. Sanderson Plumbing Prods., Inc.*, concerning judicial authority to vacate jury verdicts for plaintiffs. A week later, the Supreme Court issued its opinion in *Reeves* and did reverse the reversal by the 5th U.S. Circuit Court of Appeals of the jury's verdict for the plaintiff in that case, an Age Discrimination in Employment case. The Court reiterated and reemphasized these seminal rules of federal common law that the lower federal courts routinely ignore: Courts must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. In ruling upon dispositive motions, courts must disregard all evidence favorable to the moving party that the jury is not required to believe.

Most of the legal trade journals have cast *Reeves* as significant only in employment-related litigation, but that

circumscription belies the opinion's statement of law. *Reeves* is significant to *every* lawsuit in which a party's knowledge, intent, motive, understanding, are matters in controversy.

Except, that is, here in the 7th U.S. Circuit, where the appeals court has moved quickly to declare its independence from the constraints of *Reeves*. (Lawyers should see, e.g., *Malacara v. City of Madison*, mentioned above, and *Estate of Novack v. County of Wood*, 7th Cir., Aug. 7, 2000, and *Insolia v. Philip Morris Inc.*, 7th Cir., Jun. 16, 2000, as well as the order denying the *en banc* rehearing petition in *Gile*.) And, probably, except in the other federal circuits where Supreme Court Stakes entrants and other Federalist Society types reign.

It's not quite the Boston Tea Party, but still, James Madison would be proud. So would the National Chamber of Commerce and the League of Counties and Municipalities. There are enough kangaroos on the federal appeals courts to stock an Australian wildlife preserve.

The *Reeves* case received little notice in the legal trade journals during its Supreme Court pendency, but it has received a good deal of notice since the issuance of the opinion. One published comment notable for its blind optimism, from a lawyer described as a veteran of employment lawsuits in the 5th U.S. Circuit, was that "the party's over." But, no, the party's not yet over. It's just changed slightly, ever so slightly. It's now officially a costume party, although one at which the disguises are as transparent as shrink wrap.

Conveniently for the Stakes contestants and their ideological allies, the Supreme Court in *Reeves* merely reiterated a rule of federal *common* law – that is, a rule of law pronounced initially by the court itself, albeit in this instance one that stems historically from the Seventh Amendment's stated right to jury determination of issues of fact in most civil

lawsuits. The *Reeves* opinion did not, for example, invalidate a statute as unconstitutional, a type of ruling not amenable to lower-court shoulder shrugging and brazen disregard. And as every federal appellate judge knows, federal judges can, at their will, disregard common law – even federal common law enunciated by the Supreme Court – as long as they avoid overtly stating that that is what they are doing.

It is a time-tested tradition among the modern federal bench. I think the legal authority for it is The Federalist No. 78.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEVERLY B. MANN, Plaintiff,	)	
	)	No. 84 C 11020
v.	)	
	)	Wayne R. Andersen,
	)	District Judge
THE CITY OF CHICAGO, *et al.*, Defendants.	)	

Motion Pursuant to Fed. R. Civ. P. 60(b) (5) and (6) to Vacate the Final Judgments Entered in This Case on February 10, 1992, and March 13, 1998

The plaintiff, Beverly B. Mann, *pro se*, moves this court pursuant to Federal Rule of Civil Procedure 60(b) (5) and (6) to vacate the final judgments entered in this lawsuit on February 10, 1992, and March 13, 1998, as they are void. In support, she states, the following:

Mann bases this motion upon the statement of law enunciated by the 8th U.S. Circuit Court of Appeals in *Anastasoff v. U.S.A.*, No. 99-3917EM (8th Cir. Aug. 22, 2000), and in *Kaler v. Overboe*, No. 00-6005ND (8th Cir. Aug. 29, 2000). The *Anastasoff* opinion, written by Judge Richard S. Arnold, speaks eloquently and at length in finding unconstitutional a subsection of the 8th Circuit's rule that is materially identical to this circuit's Rule 53(b)(2), which divests that court's unpublished opinions of precedential legal effect in any but the case in which the unpublished opinion was issued. She adopts the legal analysis of those opinions as her own and includes among her supporting exhibits a copy of *Anastosoff*, as Exhibit 3.

Mann also bases her motion upon the combined effect of the U.S. Supreme Court's intermediate opinion in *Fiore v.*

White, 120 S.Ct. 469 (Nov. 30, 1999), in which the Court certified a question to the Pennsylvania Supreme Court, and the Pennsylvania Supreme Court's opinion in *Fiore v. White*, No. 269 (Aug. 21, 2000), answering the question certified to it in the affirmative. (If this court wishes to defer its ruling on this motion until the Supreme Court issues its final opinion in *Fiore* sometime this winter, Mann certainly would not object.)

She further bases her motion upon her jaw-droppingly astonishing discovery approximately two weeks ago that Judge Ilana Diamond Rovner, one of the three members of the appellate panel that heard the initial appeal in this lawsuit, has a son, her only child, who *at the time of resolution of that appeal* on January 19, 1996, was a 27-year-old recent law school graduate employed by the City of Chicago, a key defendant in this lawsuit (in which *issues of law* regarding allegations of political patronage and politically-based motive have predominated throughout), as *a political operative in the Mayor's Office of Policy*. (See Exhibits 10-12, accompanying.)

Regarding *Anastosoff*, Mann offers as Exhibits 1 and 2 two journal articles titled respectively "8th Circuit Drops a Bombshell" (*The Recorder*, Aug. 24, 2000) and "Stealth Decisions Under Fire," (*Law.com*, Sept. 4, 2000, republished Sept. 5, 2000, in *Legal Times* as "Unpublished Opinions May Gain New Impact Due to Landmark Federal Appeals Panel Decision"). The two articles summarize *Anastosoff* and note its potential effect upon continued legal validity of unpublished resolution of appeals that materially depart from the controlling legal authority existing at the time of that appellate resolution and that nonetheless, by operation of circuit rule, lack precedential value and therefore leave the law itself unchanged.

The second of the two journal articles references an article written by Judge Arnold that presaged *Anastasoff*. The article, titled "Unpublished Opinions: A Comment", published in the Summer, 1999, edition of *The Journal of Appellate Practice and Procedure*, stunningly acknowledges what has

been understood by the victims of those circuit rules as a moral certainty: that canned statements that the court deemed the grounds for appeal frivolous (a.k.a.., unworthy of the court's discussion and even of the court's *mention*) are, likely as not, to be a flat-out lie, and that indeed the canned obligatory representations by the court that it even knew what the issues on appeal were and that it actually considered them before resolving the appeal also are, likely as not, to be a flat-out lie.

The article, as much as the *Anastosoff* opinion itself, is a remarkable break from the judicial code of silence that has enabled the judicial practices at issue to continue – decade after decade. The article is particularly significant in its account of the casual manner in which one after another after another appellate panel outright lies about the manner in which a substantial number of appeals are resolved. Mann includes as Exhibit 4 a copy of the article, and incorporates its statements as part of this motion.

As for *Anastosoff* itself, the opinion finds that the circuit rules that divest the resolution of some appeals of their constitutional *stare decisis* status violate Article III of the Constitution, because they confer upon those courts what, by its nature, is a legislative rather than a juridical function. Thus *Anastosoff* finds an outright lack of court jurisdiction to issue orders that are effective only in a singe case and that depart materially from established law.

It would seem to follow then that such orders are void; they simply lack legal validity.

In Mann's case, *each* of the unpublished orders resolving the two appeals contains, by its operation, holdings that depart significantly from federal law as it existed before the issuance of the respective unpublished order and as it exists today, as reinforced by numerous published opinions published *since* the resolution of Mann's appeals. The order resolving the second of the two appeals not only departs from long-established and continuing rules of federal law but also

from long-established and continuing rules of Illinois state law.

(E.g. Illinois law held, and holds, that issues concerning motive are questions of fact to be determined by the factfinder after consideration of the evidentiary rather than – as the both the district court and the appellate court held *without annotation* in Mann's case – questions of law to be determined without reference to the evidentiary record. Also e.g., Illinois law required, and requires, that contract disputes be resolved by reference to the terms stated in the contract at issue rather than by an appellate court without reference to the terms of that contract. Also e.g., Illinois law requires that tort damages be determined by the trier of fact after consideration of the evidence regarding the nature and extent of the injuries sustained, rather that by an appellate court without reference to the evidentiary record – as the appellate court did, again without annotation to legal authority, in Mann's case.)

The unpublished orders resolving those two appeals in Mann's case therefore constitute *de facto* bills of attainder, thus they also violate Article I, Section 9 (as well as Article III).

Article I, Section 9, states: No Bill of Attainder or ex post facto Law shall be passed.

Indeed, in Mann's case, Judge Richard A. Posner, as chief judge of the 7th Circuit Court of Appeals last winter, has found in resolving complaints of judicial misconduct that Mann brought against the judicial panel in her second appeal that the panel *had*, in effect, passed, by judicial fiat, several bills of attainder in her case. Mann had alleged in her complaints that those judges deliberately misrepresented in their unpublished order of resolution that they knew the grounds upon which Mann had brought that appeal (and appeal that actually was a set of *three* consolidated appeals, each of which addressed rulings that stated various purported rules of law that were independent of one another and that therefore required separate consideration).

Judge Posner dismissed the complaints upon a finding that there was "absolutely no evidence" that the panel was unaware of the various grounds for appeal, and, inferentially, the body of settled law upon which Mann had brought her appeals. (See Exhibits 5-9, accompanying.) Given the vast body of such precedent and the appellate panel's stark deviation from that body of law in Mann's case, Judge Posner's finding acknowledges that the court *consciously exempted* Mann's case from application of the law, some of it written by Judge Posner.

Accepting the analysis in *Anastasoff*, the court lacked the legal authority, and therefore the jurisdiction, to do that. By that analysis, the appellate court orders issued in the two appeals in Mann's case are void.[1]

Sometime before she presents this motion to the court, Mann will supplement it with a supporting memorandum in which she will detail the relationship between *Anastasoff* and Mann's case. For now, though, she notes the uncanny parallel between the first three questions presented in the certiorari petition that Mann filed with the Supreme Court last winter and the fist four pages of the Argument section of that petition, on the one hand, and Judge Arnold's discussion in *Anastasoff*, particularly the discussion that addresses material

---

[1] On August 28, 2000, Mann filed a motion pursuant to Circuit Rule 53(d)(3) with the court of appeals citing *Anastosoff* and requesting publication of the Rule 53 orders entered in the two earlier appeals in this case. The court clerk's office did not process the motion, however, instead returning the copies of it to Mann along with a letter from the *pro se* clerk instructing her that (notwithstanding any such indication in the wording of Rule 53), her motion must be phrased as a motion to recall the mandate, and that, in any event, she would have to file separate motions pertaining to each set of appeals (rather than a single consolidated motion, as her submitted motion was). Mann did not file the motions because she recognizes that that court does not grant motions to recall mandates.

considerations beyond those he discussed in his published journal article a year earlier. (Mann has joked that her certiorari petition may have been granted, after all – by the 8th Circuit Court of Appeals. But, as she will detail in her supporting memorandum, she has some reason to believe that there actually *is* an immediate connection between her petition and *Anastasoff*.) Those first three Questions Presented were:

> 1. Whether a federal circuit rule that permits the resolution of appeals by unpublished order may entitle an appellate court to avoid applying extensive pertinent settled law to arbitrarily selected cases, or whether, instead, a federal appellate court's use of that rule as a device by which to exempt some cases from application of the law actually creates two parallel bodies of law utterly independent of each other and thus violates the fundamental dictate of the Fifth Amendment's Due Process Clause.
>
> 2. Whether a federal appellate court must apply the doctrines of the law of the case and of waiver of claims and defenses as those doctrines are delineated in nearly 60 published opinions issued by that same appellate court within the last five years and by this Court in *Agostini v. Felton*, 521 U.S. 203 (1997), when a plaintiff asserts those doctrines in a successive appeal as having precluded defenses after fourteen years of litigation, or whether, instead, appellate-court application of those doctrines is merely optional as long as the appeal is resolved via unpublished (and mostly unexplained) order.
>
> 3. Whether, prompted by a belief that unpublished appellate resolution that deviates from universally established law is of no large importance because it does not actually alter the law, an *en banc* federal appellate court is entitled to promulgate an internal court policy that prohibits it from hearing, *en banc*, any appeal that was resolved by unpublished order – or whether, instead, such a

policy itself fundamentally and impermissibly alters the law by effectively (albeit quietly) dismantling the Equal Protection component of the Fifth Amendment's Due Process Clause and perhaps the Due Process Clause itself.

As this court knows, Mann earlier filed two motions with this court pursuant to Fed. R. Civ. P. (b)(5) and (6). The initial one, filed on April 17, 2000, moves to vacate the order entered on July 14, 1986, that dismissed a key count in Mann's operative complaint pursuant to Fed. R. Civ. P. 12(b). That motion is based largely upon the issuance of the U.S. Supreme Court's opinion in *Village of Willowbrook v. Olech*, 120 S.Ct. 1073 (Feb. 23, 2000). Her second motion, filed on August 1, 2000, is based upon the U.S. Supreme Court opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, *supra.*, reaffirming (or affirming, via reversal of a judgment as a matter of law entered by an appeals court in favor of the defendants in that case) unanimously that determinations concerning the state of mind – e.g., motive, belief, extent of culpable knowledge, intent – of defendants in civil litigation is a question of fact rather than a question of law and that, as such, these determinations must be made by the fact finder upon hearing and considering the evidence.

Both motions remain pending, awaiting a ruling on Mann's mandamus petition to the appellate court seeking the recusal of District Judge Wayne R. Andersen. Mann has concluded that the appellate court will never resolve her mandamus petition, so she will ask this court to rule on her pending motions (and this one, once the *Fiore* opinion is issued), notwithstanding her grounds for seeking Judge Andersen's removal from this litigation.

In support of those motions, Mann filed extensive exhibits, most significantly a complete five-volume set of her filings with the Supreme Court last winter. (The set includes her certiorari petition, two supplements to that petition, her petition for rehearing and a supplement to the petition for rehearing.) Those documents delineate with detailed annota-

tion the appellate court's many departures from settled law, express or necessarily implied, in the appellate court's July 14, 1999, Circuit Rule 53 order resolving the second set of appeals in this case. Mann refers this court to her volumes of exhibits filed in support of her two earlier-filed pending motions, and she incorporates those exhibits as part of this motion.

The memorandum that Mann plans to file in supplement to this motion also will discuss the U.S. Supreme Court's intermediate opinion in *Fiore*, the Pennsylvania Supreme Court's opinion in *Fiore*, and the significance of that case to the legitimacy of the legal findings and analysis in *Anastasoff* – and, in turn, this motion.

The memorandum also will discuss the effect of Judge Rovner's conflict of interest during the first set of appeals in light of her incessant self-marketing to the public and (more significantly) to her colleagues as a champion of women who allege gender-related discriminatory conduct in the course of their employment (as Mann did in portions of her complaint upon which summary judgment was affirmed without even a word of explanation), and in light of her declared support (in *published* opinions) of government employees who allege violation of their First Amendment free-association rights (as Mann did in other portions of her complaint upon which summary judgment was affirmed, also without a word of explanation).

Her panel colleagues – one of whom has yet to meet an evidentiary record in an employment-related case that he thinks actually could *support* a jury verdict in favor of the employee-plaintiff, the other who regularly writes elaborately detailed opinions explaining the court's reasons for affirming summary judgments in employment cases but only when there actually *exists* legitimate reasons for the court's affirmance – hardly would *dispute* voiced conclusions by Judge Rovner favoring the defendant in an employment case, or even actually *read* the plaintiff's briefs.

Mann also will discuss the effect of the off-handed affirmances of the initial set of summary judgments upon the district court's grant of the post-remand summary judgments, after remand. She will discuss, particularly, the inspirational role of those off-handed affirmances in the post-remand district court's off-handed grant of summary judgment upon sweeping and utterly unexplained findings of fact or law; Mann doesn't know which, because the court didn't deign to identify which.

And she will discuss, also, the inspirational role of those off-handed affirmances its inspirational role in parrot-like appellate affirmance of those summary judgments upon sweeping and utterly unexplained findings of fact or law. (Mann doesn't know which, because the court didn't deign to identify which.)

And she will note that during the twelve years when she was making the major financial decisions that enabled her to continue to pursue this litigation year after year but that will impact her life significantly for the rest of her life, she was entitled to a straightforward public acknowledgment by the appellate court that it does not apply the pertinent law when it wishes (whether for personal or ideological reasons) not to do so – that the court need only invoke its Rule 53 before it effectuates a single-case exemption of the law.

Instead of paying her lawyers (through the teeth) and paying Lexis a four-figure amount for her extensive online research (at a rate of $4.25 per minute) when drafting the Argument sections of her briefs in the first set of appeals, Mann should have cut to the chase and just hired a private investigator. As for the City of Chicago, it got its money's worth for Maxwell Rovner's salary.

And then some.

Respectfully submitted,

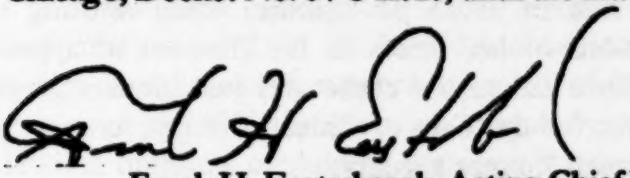
Beverly Mann
Plaintiff *Pro Se*

This is the reassignment order referenced in the Petition at p. 25 and 27.

AO 25B (Rev. 6/83)

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign the Honorable G. Patrick Murphy, United States District Judge for the Southern District of Illinois, to hold a district court in the United States District Court for the Northern District of Illinois in the matter *of Beverly Mann v. City of Chicago*, Docket No. 84 C 11020, until the matter is resolved.



Frank H. Easterbrook, Acting Chief Judge
Seventh Circuit

Dated: January 25, 2001

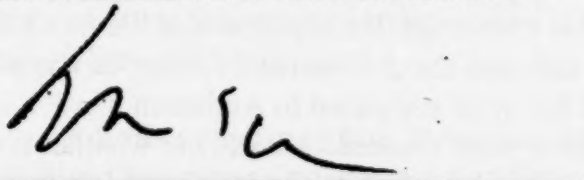
UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS

ORDER OF THE EXECUTIVE COMMITTEE

It appearing that an order was entered on January 25, 2001 by Acting Chief Judge of the Seventh Circuit Court of Appeals Frank H. Easterbrook designating the Honorable G. Patrick Murphy of the Southern District o£ Illinois to act as the assigned judge in 84 C 11020, Beverly Mann v. City of Chicago, therefore

IT IS HEREBY ORDERED that 84 C 11020 be reassigned from the calendar of the Honorable Wayne R. Andersen to the Honorable G. Patrick Murphy.
ENTER.:

FOR THE EXECUTIVE COMMITTEE



Chief judge

Dated at Chicago, Illinois thisday of February, 2001

This is a note Mann wrote for her own records on March 1, 2001, memorializing her conversations re: the reassignment orders appearing at Apps. N and O. (Nellie Finch is the operations manager in the District Court Clerk's Office. Tresa Abraham is District Judge Wayne R. Andersen's minute clerk.) She attached a copy of the note to a motion she filed in that case. A follow-up note, which she also made an exhibit to a motion in that case, appears at App. P(a).

March 1

Conversation with Gladys Lugo, Aspen's minute clerk, in her office today at about 4:00:

She acknowledged that as Tresa Abraham told me, Andersen submitted to Aspen a standard recusal order on which he wrote a narrative explanation for his recusal. Lugo said that Aspen drafted his own order, the one that was filed, in place of Andersen's, and said about Andersen's order: **It wasn't issued**. I asked her what happened to Andersen's order, and she repeated that it wasn't issued. I asked her whether it was just thrown out. She shook her head very slightly and said it just wasn't issued.

Yesterday Nellie Finch told me that the Clerk's office simply received Easterbrook's order and that that was the first her office had heard of any of this.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS

ORDER OF THE EXECUTIVE COMMITTEE

It appearing that the Honorable Wayne R. Andersen recused himself from 84 C 11020, Beverly Mann v. City of Chicago, and

It further appearing that an order was entered on January 25, 2001 by Acting Chief Judge of the Seventh Circuit Court of Appeals Frank H. Easterbrook designating the Honorable G. Patrick Murphy of the Southern District of Illinois to act as the assigned judge in 84 C 11020, Beverly Mann v. City of Chicago, and

It further appearing that, through a clerical error, the Executive Committee Order entered on February 21, 2001 reassigning 84 C 11020 to the Honorable G. Patrick Murphy omitted the statement provided by judge Andersen concerning his recusal, therefore,

IT IS HEREBY ORDERED that the Executive Committee Order entered on February 21, 2001 in 84 C 11020 be amended to reflect the following statement be judge Andersen: The plaintiff, Ms. Mann, has expressed extreme feelings about her belief that this Court has not and will not treat her fairly. She filed a motion to recuse which was denied. She filed a petition for mandamus with the Seventh Circuit which was also denied. Nevertheless her feelings at this time seem so intense that I respectfully recuse myself with the

suggestion that Ms. Mann's pending motions be reassigned to a judge from another district.

ENTER:
THE EXECUTIVE COMMITTEE

Chief Judge
Dated at Chicago, Illinois this 12th day of March, 2001

This is a note Mann wrote for her own records on March 23, 2001, memorializing her conversations re: the reassignment order appearing at App. P. (Nellie Finch is the operations manager in the District Court Clerk's Office. Tresa Abraham is District Judge Wayne R. Andersen's minute clerk.) She attached a copy of the note to a motion she filed in that case. The note is a follow-up to the one that appears at App. O(a).

March 23

I spoke today with Nellie Finch in follow-up to my conversation with her on March 21.

On March 21, after learning of the amended reassignment order quoting what purports to be Andersen's comments on his original never-issued recusal order, I had phoned Finch and asked whether I could get a copy of that original piece of paper on which Andersen's comments appeared. She told me that it no longer exists, to which I responded that it apparently did exist on March 12, the date that appears on the amended reassignment order. She also told me that it was Michael Dobbins, not Aspen, who drafted both the original reassignment order and the amended one; she said Dobbins drafts reassignment orders and then forwards them to Aspen for his signature. She also asked me why I wanted to see Andersen's original document, given that its language is quoted in the amended reassignment order. I told her that I did not believe that the language that purports to be taken from Andersen's original order actually was taken from that order, and that the final sentence of that language conflict with what Tresa Abraham told me was in the original order. I related to her the specifics of my conversation with Abraham, which occurred in Abraham's office late in the afternoon on

March 1. Finch told me she would speak with Dobbins and get back to me.

She did not get back to me, so I phoned her this morning. She said she had spoken with Dobbins about this and that he said Andersen's original document no longer exists. She said he told her that he had thrown it away after quoting from it in drafting the amended reassignment order. I said that no one but a moron would believe that story. I said I believe that the language that appears in the amended reassignment order as Andersen's was contained not in Andersen's original document but in one that he drafted on or shortly before March 12 (a Monday). I told her that I had phoned Andersen's chambers a few days earlier and again earlier in the morning on March 12 and asked whether he would tell me why he had recused himself; I explained that his original order containing his explanation was never processed and that I was told it no longer existed. I also said that my main interest was in learning whether he was the one who made the recusal decision or whether, instead, his recusal was ordered by the appellate court. (In my first call to his chambers, on the morning of, I think, March 8, I spoke with Andersen's regular secretary, who said she would relay my request to him. I called back late that day, and she said she had told him, and that he had not responded. She also said he had a jury trial that week and was pretty busy. When I phoned on the morning of March 12, I spoke with a substitute secretary, who said the regular secretary was on vacation that week. I repeated my request to her, explaining it in some detail, and she said she would relay it to the judge.)

In my conversation with Finch this morning, I said I suspect that the language in the amended reassignment order purporting to quote from Andersen's original order actually quoted from one he drafted on March 12, and that its language was not his own but that dictated to him by someone at the appellate court. I asked her to relay my comments to Dobbins

and that I would I appreciate any further information he could, or would, give me. She said she would. I will, of course, hear nothing further from them on this.

Giving thanks . . .

November 24, 2000

BY MICHAEL SNEED SUN-TIMES COLUMNIST

. . . the day after Thanksgiving. In the midst of the madness of being **Mike,** and a nation mired in vote glut, I've decided to take time to update my gratitude list for the year 2000.

So thanks for:

A country where we can have political brouhaha without bringing out the bangalores.

My son, **Patrick,** surviving his freshman year at the University of Wisconsin.

Good teeth.

Wisteria.

The courage of foster parents who have the guts to love a child they may one day lose.

The Missouri River.

The Sonoran desert of Arizona at 8 a.m. and 5 p.m.

A town called Why.

The cactus wren.

The comfort of animals.

Cumin. Cilantro.

Canada.

Finding a way to smile after discovering my sister, **Jo,** had gotten married this summer while I was getting dressed for her wedding! (As my mother once said about my crazy but wonderful family: "If your father were alive, he'd be dead again.")

The Ya-Ya's: Having dinner once a month with a gaggle of *brilliant* women named **Anne, Honey, Lynn, Delilah, Chris, Ilana, Maureen, Kathy, Pat, Sharon, Judy** and **Dorothy** at each other's houses to discuss . . . *politics!*

Growing up in North Dakota.

Former U.S. Labor Secretary **Lynn Martin's** assurance I'd be her secretary of interior focusing on North Dakotan affairs if she were president.

Justice **Anne Burke's** squash soup.

My new assistant and right hand, **Amanda Beeler,** who is famous for one word, "Done!"

Joe Hannon's amazing book list.

Abraham Lincoln.

Gov. **George Ryan's** stand on the death penalty.

First lady **Lura Lynn Ryan** serving me microwaved Krispy Kreme doughnuts after my overnight stay at the Executive Mansion.

My salsa.

The tango.

An Irish tune backdropped by a harvest moon at **Jack Ryan's** house in September.

Dave Gilbert and **Ted Tetzlaff,** the male bookends of my life; finally getting used to **Jim Trebilcock's** last name; my pal, **Jerry Bolger,** who runs St. Michael's House for policemen suffering from addiction, who is the book of hope.

Sunday breakfast at Boris' in Hubbard Woods.

My soulmates: **Carol Carroll, Mary Laney, Betty Elliot,** Anne Burke, **Leslie Hindman, Iris McCaffery, Rita Girardi** . . . and my Belgian neighbors, **Minneka** and **Peter,** who are a reminder of how life should really be lived.

My southern pal, **Eleanor Randolph,** a New York Times editorial writer, who keeps reminding me that all southerners exaggerate.

The French Quarter in New Orleans, where **Anne Moffet** serves a mean Long Island Iced Tea.

Writer **Stephen Ambrose.**

Albrecht Ragg, gardener extraordinaire, who is turning my backyard into a combo Great Wall of China and the Tuileries.

Traveling to China with **Dorothy Collin** and **Steve Thoresdale,** "a citizen of the world."

My confirmation name: Isabelle.

Honduran coffee in the morning.

Pig Latin.

The sound of crickets at night.

Bees.

A fresh English scone.

Biedermeier furniture.

A tomato from my backyard.

The WTTW-Channel 11 special "A Child's Christmas in Wales."

And the English poet **Chidiock Tichborne,** who penned "Elegy" in 1586:

My tale was heard and it was not told, My fruit is fallen and yet my leaves are green, My youth is spent and yet I am not old, I saw the world and yet I was not seen, My thread is cut and yet it is not spun, And now I live, and now my life is done.

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Mann filed this motion on June 5, 2001. It was denied a few days later in an undated order written in the first-person by Judge Easterbrook. (See App. P(b).)

In the
United States Court of Appeals
for the Seventh Circuit

BEVERLY B. MANN, Plaintiff,	)	
	)	No. _____
v.	)	
	)	Dist. Court No. 84 C 11020
THE CITY OF CHICAGO, *et al.*, Defendants.	)	

Motion Pursuant to 28 U.S.C. § 291 and the Guidelines for the Intercircuit Judicial Assignment for Certificate of Necessity of Assignment to an Intercircuit Visiting Judge

The plaintiff, Beverly B. Mann, *pro se*, moves this circuit's chief judge pursuant to 28 U.S.C. § 291 and the Guidelines for the Intercircuit Assignment of Article III Judges (approved by Chief Justice William H. Rehnquist on Oct. 21, 1997), to certify that a need exists for the designation and assignment of an Article III judge from another circuit (or special court) to perform all district court judicial duties in this lawsuit. In support, she states the following, using her preferred first-person (rather than the conventional third-person) construction:

I currently have five motions pending pursuant to Federal Rule of Civil Procedure 60(b) (5) and (6). I filed the first of those motions on April 17, 2000, and the last of them on June 4, 2001.

The first of those motions also moved for the recusal of the district judge, Wayne R. Andersen, and when that request was denied I filed an interlocutory appellate mandamus petition requesting a mandate requiring his recusal. My mandamus petition was denied in an opinion issued on October 13, 2000, in *In Re: Beverly B. Mann* (No. 00-2247). The opinion, written by Judge Diane P. Wood, contained a lengthy parenthetical that, while labeled by the opinion itself as dictum, Judge Andersen and my opposing counsel and I all read as a *de facto* directive to deny my Rule 60(b) motions. Although my third motion was filed coincidentally on the day that Judge Wood's opinion was issued, and although my fourth motion was not filed until three months later, Judge Andersen said at a hearing on January 16, 2001, that he thought Judge Wood's opinion directed him to deny *all* my motions – those pending when that opinion was issued and those filed later – as time-barred.

Because I agreed with that assessment and recognized that, at the least, the district judge was likely to understand it as such, I filed two motions with the appeals court requesting the deletion of the parenthetical. I filed the first one shortly

after the opinion was issued, the second one on January 17, 2001, citing Judge Andersen's comments at the hearing a day earlier. Both motions were denied without comment.

But on January 25, 2001, Judge Frank H. Easterbrook, acting as chief judge upon Chief Judge Flaum's recusal, issued an order reassigning this case to Judge G. Patrick Murphy of the Southern District of Illinois, as a visiting judge. Judge Murphy has issued no rulings in the case.

I bring this motion less because I continue to believe that Judge Wood's published opinion is an unequivocal *de facto* instruction to the district judge to deny my motions than because, given the particular substance of three of my five motions, their grant would place the district judge in an untenable position with the members of the very appeals court that regularly reviews that judge's rulings, in one case after another.

Judge Murphy's role here is essentially as law clerk to the Court of Appeals. His job is not to give genuine consideration to the merits of the motions but instead to draft an order denying them in a way unlikely to enable the eventual filing of a petition for writ of certiorari that has some chance to be granted. His own relationship with the appeals court depends upon his performing this assignment competently. He can't, therefore, actually consider the merits

of the motions; he can, and in fact must, only pretend to do so. He has, in other words, an inherent conflict of interest here.

I filed the last of my Rule 60(b) motions on June 5, 2001. The motion contains a summary of the motions that present the conflict of interest, and so I attach a copy of it here as Exhibit 1.

The same would be true of any other district judge in this circuit, and so only an assignment of this case to a judge from another circuit would enable genuine consideration of the merits of the motions.

I submitted this motion to the appeals court rather than to the district court because it is the chief judge of the appeals court who has the sole authority pursuant to 28 U.S.C. § 291 and the Guidelines for the Intercircuit Assignment of Article III Judges to issue the necessary Certificate of Necessity.

Respectfully submitted,

Beverly B. Mann
Plaintiff *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

Circuit Judge Frank H. Easterbrook

Beverly B. Mann,
Plaintiff

v. United States District Court for the Northern District of Illinois No. 84 C 11020

The City of Chicago,
et al.
Defendants

The Plaintiff, Beverly B. Mann, has presented a motion for certificate of necessity for the assignment of a judge from outside the circuit to her case, No. 84 C 11020, in the United States District Court for the Northern District of Illinois. The request was presented to me as the next judge in seniority as Chief Judge Joel M. Flaum recused himself in this matter.

After consideration of the motion, it is denied.

[Send copies to Judge Murphy, Judge Aspen, and Michael Dobbins]

Mann filed this response to Judge Easterbrook's dismissal of the judicial misconduct complaint Mann filed against Judge Ilana D. Rovner. It is referenced in the Petition at pp. 24-25. She wanted to include his three-page dismissal memorandum order but she could not find her copy of it.

November 28, 2000

Gino Agnello
Clerk, Court of Appeals for the 7th Circuit
21 South Dearborn Street
Chicago, Illinois 60604

Re: Petition to the judicial counsel for review of dismissal of judicial miscount complaints. Complaint No. 00-7-372-27; complaint No. 00-7-372-28.

Dear Mr. Agnello:

I hereby petition the Judicial Council for review of the chief-judge-in-training's orders that dismissed judicial misconduct complaints I filed against Judge Ilana Diamond Rovner and Judge Diane P. Wood on October 16, 2000. The dismissal orders are dated October 30, 2000.

The chief-judge-in-training complains in his explanatory memorandum that although I am a lawyer, I elected in my complaint to present invective and sarcasm rather than legal argument. But having presented *extensive* legal argument in the four briefs I filed with this court in my two successive appeals in the litigation at issue, and finding no evidence in the resolution of those appeals that *any* judge read *any* but a single four-page section of my legal argument (a section in my opening brief in the first appeal that addressed an erroneous

jury instruction), I thought it advisable to try a different approach this time. And invective and sarcasm seemed the obvious option.

The criticism notwithstanding, the tactical change worked. The chief-judge-in-training appears to have actually *read* all nine pages of my complaint and supplemental letter before drafting (apparently all by himself) the three-page explanatory memorandum. That's nine more pages than he read as a panel member in the second of my successive appeals, and three more pages than he or his two colleagues in that appeal wrote in resolving it. (The inanities of a staff attorney don't count in this tabulation.)

So, flush with success, but yielding to that judge's better knowledge of the formal requirements for presentation of judicial misconduct complaints, i.e., legal argument rather than invective and sarcasm, I enclose copies of legal briefs I filed recently in my lawsuit, two of them with the district court and one with this court, all containing legal argument. I also enclose a copy of my affidavit filed as an exhibit to one of those legal briefs. They buttress my allegation that Judge Rovner's participation in the initial appeals in my case constituted judicial impropriety. And I add some legal argument below.

Caveat: The legal argument contains invective and sarcasm, inasmuch they are not really mutually exclusive.

The chief-in-training writes that "the important question [is] whether the judge's impartiality could *reasonably* be questioned even though the judge held a position unrelated to the litigation. 'Reasonably' is an important qualification; the standard is objective and is applied from the perspective of a disinterested observer aware of all important facts." Judge Rovner's son was a political operative in the mayor's office. My lawsuit alleged the

deceitful evasion of the laws that prohibit certain politically motivated conduct, and this court was asked in that initial appeal to define the parameters of municipal and individual liability under the legal theories presented to it – just as it was asked to do, and did do, two years later in *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998), a case that held contrary to this court's affirmance of a Rule 12(b)(6) dismissal in my case.

Maxwell Rovner held a position directly effected by the outcome of parts of my appeal, every bit as effected as it was by the outcome in *Olech* before this court and ultimately before the Supreme Court, in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000). But Judge Rovner was not a member of the panel that heard *Olech* in 1998 , nor a member of the panel that heard the appeal in any case in which the City of Chicago was a party during here son's tenure as an assistant to the mayor. Except mine.

Coincidence? No, in fact, in 1999 she recused herself from this court's *en banc* consideration of a case in which the City was a defendant. And she recused herself from the second full appeal (as distinguished from the mandamus petition I filed in March, 1998, from which she did not recuse herself) in *my* lawsuit, doing so (presumably) for precisely the reason that the chief-in-training now says she needn't have in the initial appeals in my case.

The chief-in-training finds, in other words, that Judge Rovner's recusal from the 1998-99 appeals in my lawsuit was unreasonable.

He also finds implicitly that the current *real* chief judge acted unreasonably when he recused himself from the initial appeals in my case because his own son then held a *non-policymaking* position with the City of Chicago unrelated to my litigation. The affidavit that I enclose here supports a

supplement that I filed with the district court on November 15, 2000, in support of the last-filed of my three pending Rule 60(b) motions, one based in part upon Judge Rovner's conflict of interest during the initial appeals. In that supplement, I describe portions of my affidavit and some of the other exhibits to the supplement as follows:

1. [Mann's] affidavit also attests that on the day in March, 1995, in which the cross-appeals in her case were argued, Judge Joel M. Flaum was a panel member on each of the other five cases argued in that courtroom that day and that Judge William J. Bauer replaced Judge Flaum only to hear the appeal in Mann's case, which was argued last that day. Mann attests that she later learned that Judge Flaum's son Jonathan was, at that time, employed by the City of Chicago as an assistant corporation counsel in the Torts Division, presumably the reason that Judge Flaum recused himself.

2. A copy of an entry from Sullivan's Law Directory indicating Jonathan Flaum's employment with the City of Chicago as an assistant corporation counsel in the Torts Division and a copy of Judge Flaum's entry in Who's Who in American Law indicating that he has two children, one of them named Jonathan. (Exh. 2.)

3. A copy of the appellate court docket-sheet page from Mann's second set of appeals showing that on January 19, 1999, one day before her son resumed his employment as an assistant to the mayor in the Mayor's Office of Policy after his hiatus while serving as a speechwriter in Sen. Carol Mosley-Braun's reelection campaign, Judge Rovner participated in the panel's determination that the second appeals were successive to the first set of appeals and that, therefore, in accordance with that court's procedure, the panel

4. that heard the first appeals also would hear the second ones. (She nonetheless did recuse herself from the second appeals before oral argument, presumably

5. because of her son's reemployment as an assistant to the mayor.)

Apparently for lack of anything supportive of his finding *and* relevant to the matter before him, the chief-in-training expounds upon recusal law concerning judges whose child serves as an assistant U.S. attorney. He concludes that such judges need not recuse themselves in cases in which the United States is a party unless the judge's child is directly involved in the litigation – a rule, he explains, born of necessity given the vastness of the Justice Department and its monopoly particularly on prosecution of criminal defendants in federal court. No quarrel there, but it's ineffective as a smokescreen; there was, after all, no such necessity in my case, as evidenced by the ease with which the court found a replacement for Judge Flaum in the initial appeals in my case and a replacement for Judge Rovner in the 1998-99 appeals.

A better analogy would be the circumstance addressed by the Supreme Court in *Williams v. Taylor*, 99-6615 (S.Ct. April 18, 2000), albeit an opinion concerning juror rather than judicial bias. And then there is Chief Justice William Rehnquist's discussion, in Microsoft v. U.S., 530 U.S. __ (Sept. 26, 2000), of the requirements of § 455 and his explanation for why he declined to recuse himself in that case, a discussion that the chief-in-training should would have referenced if it could be interpreted, even spun, as supportive of his conclusion. But apparently he concluded that it could not be.

The chief-in-training, famous for his legislative decrees (wasn't he the judge who passed the statute mandating the denial of attorneys' fees pursuant to 28 U.S.C. § 1988 if

the award of damages in the case amounted to less than 10% of the ad damnum in the complaint?), now finds in 28 U.S.C. § 455 the prerequisite of news media attention to the case, absent a direct role by the judge's child in litigating the case. The issue of news media attention and the related issue of direct involvement in this litigation by Mayor Daley or at least by his first corporation counsel, Kelly Welsh, is a complicated one. It involves, in part, the events I described in detail in an affidavit I drafted and signed in the summer of 1991, which I think is somewhere in the record of the case, maybe as part of the pretrial order. (Neither my own nor my various former attorneys' filing systems are, suffice it to say, the paradigm that Andersen Consulting recommends to its clients, and so I have been unable to find copies of the affidavit, although they do exit somewhere, I think.)

It also involves [1] the relationship between a lawyer named E. Michael Kelly, a senior partner at Hinshaw & Culbertson, the law firm that represented me in the case from February, 1987, to mid-1990, and Mayor Daley's brother William; [2] the timing of Hinshaw's publicized loss of its largest client (the insurance carrier CNA) in the spring of 1990 and then-managing Donald Mrozak's reaction to it as described in an item in a law-related column published in the April 3, 1990, edition of the *Chicago Tribune*; [3] Hinshaw hiring-committee chair William Swindal's[1] knowledge of and involvement in representation of me, as evidenced by his emergency handling of a deposition of one of my witnesses who, by then living in Israel, unexpectedly was in town for his father's funeral when my lead attorney, Hinshaw partner Michael Leech, was out-of-town; and [4] the timing and

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[1] As hiring-committee chair, Swindal was intimately involved in handling the fall-out from the situation discussed in the *Tribune* item, and in fact was quoted about it in an article published in *Crain's Chicago Business* that spring. Swindal died in 1997.

circumstances of Leech's withdrawal as my attorney in May, 1990, four weeks before the trial was scheduled to begin, and related circumstances concerning the defendants' filing of its first summary judgment motion in July, 1990, which was granted concerning ***all*** of my several civil rights jury counts – summary judgments that Judge Rovner participated in affirming *without even a sentence of explanation regarding* ***any of them.***

The chief-in-training is flat-out wrong in stating that the appeals in which Judge Rovner participated did not effectively resolve this lawsuit in favor of the defendants.

I enclose a copy of the *Tribune* article, and I will (I think) submit in support of this appeal a copy of the deposition of witness Stuart Kurland taken by Swindal in April, 1989, in the next day or two. The deposition addressed the heart of the politically sensitive issues in my lawsuit. It comprised part of the record submitted in response to the defendants' summary judgment motion, the granting of which, to reiterate, Judge Rovner agreed to affirm without comment.

I already submitted along with my judicial misconduct complaint an exhibit that details the matter concerning Leech's withdrawal.

And then there is the chief-in-training's statement that "[t]he litigation underlying this complaint is trivial from the municipality's perspective," a comically self-fulfilling conclusion given his own role in rendering it so; both the initial appeals and the appeals in which he participated concerned numerous issues theoretically of legal significance to that municipality and others, but those legal issues were not addressed or even acknowledged by this court in either set of appeals. Which is, of course, a point in this misconduct complaint.

If that judge does believe that there no were issues in my lawsuit of legal significance to the defendant municipality, it only because he failed as a panel member in the 1998-99 appeals to read my briefs (or even the Table of Contents in my briefs).

"Moreover," he continues, "public employment is a poor payoff for a lawyer, such as the judge's son." Certainly it was for me, which is the point of my sixteen-year-long litigation – although, of course, I am not a judge's daughter, so I suppose I should not have been foolish enough to pursue the matter in federal court, at least not in *that* federal court. I concede the chief-in-training's point there.

But when he follows that statement with an observation that "[s]killed lawyers can make considerably more in private practice than in public (and non-legal) employment," I suspect he really is thinking not of Maxwell Rovner (who was licensed to practice law in Illinois only four months before beginning his employment with the City and who probably was not yet a skilled lawyer) but of himself. Assuming, that is, that he is a *skilled* lawyer – perhaps a problematic assumption.

In any event, I invite the judge to test his premise, although I do not quarrel with the theoretical accuracy of it. I would amend it, though, to mention that skilled lawyers whose former employers blacklist them from employment elsewhere *cannot* make more in private practice than in public employment – not even than in public employment as, say, a dog catcher. I have learned this from first-hand experience, incidentally a central point in my lawsuit.

If, as the judge says, Maxwell Rovner's "decision to work for the city must be understood as a sacrifice for the sake of public service, not as a boon," the judge's own sacrifice must be understood as an even greater one, although, while

certainly appreciated, not essential to the survival of the republic.

As for my own sacrifice for the sake of public service, if has been involuntary for the last one and one-half decades and is indeed a sacrifice rather than a boon.

As for my complaint against Judge Wood, I refer the Judicial Counsel to the enclosed document titled "Supplement to All Three Pending Motions Brought Pursuant to Fed. R. civ. P. 60(b) (5) and (6)," filed with the district court on November 9, 2000 (it is not the supplement quoted at length above), and to the Argument section of the enclosed copy of the motion that I filed with this court on October 31, 2000, in my recent mandamus-petition litigation.

Truly yours,

Beverly Mann
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

This order is referenced in the Petition at pp .27-28.

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants-Appellees.

Nos. 99-1750 & 99-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September 5, 2001

Before:

Hon. Frank H. Easterbrook, Circuit Judge

ORDER re: Motion for Assignment to a Three-Judge Panel. On August 31, 2001, a three-judge panel decided these appeals. Thus, the requested relief has already been provided. The motion will be filed without further judicial action.

This order is referenced in the Petition at p. 20 and 27.

In the
United States Court of Appeals
for the Seventh Circuit

Beverly B. Mann, Plaintiff-Appellant, v. Aurelia Pucinski, as Clerk of the Circuit Court of Cook County, Illinois, and and Cook County, Illinois, Defendants-Appellees.	))) Nos. 99- 1750) and 99-3595)) Dist. Court) No. 98 C 8004)) Hon. Harry D.) Leinenweber)

MOTION FOR ASSIGNMENT TO A THREE-JUDGE PANEL

The Plaintiff-Appellant, Beverly B. Mann, *pro se*, moves this court to assign these appeals to a three-judge panel for resolution on the merits.

Briefing in these appeals was concluded nearly a year ago and a docket entry dated March 3, 2000, indicates that the appeals have "been determined to proceed without oral argument, pursuant to Circuit Rule 34(f)." About two weeks ago Mann phoned this court's clerk's office and asked whether, since there would be no oral argument, she could learn the composition of the panel assigned to the appeals.

She was told that there had been no assignment to a panel, that instead the appeals were assigned to a single judge – which seemed odd to her even by the standards (such as they are) that this court applies to *her* various appeals. (There have been several, all but this one concerning a single other lawsuit.)

So she persuaded the clerk to check further. After checking, the clerk told her that the appeals indeed currently were assigned to a single (unidentified) judge but that eventually they would be assigned to a three-judge panel for resolution.

Which suggests to Mann that these appeals somehow became derailed from the normal progression track and have been forgotten about, and she asks that they be assigned to a panel for resolution.

Respectfully submitted,

Beverly B. Mann
Plaintiff-Appellant *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

Mann submitted this article on April 9, 2001, for publication in the New York Times. The submitted article appears to have prompted an article published in the April 18, 2001, edition of the New York Times (see App. V(a)) that quotes a "prominent [federal] appeals court judge" who "spoke on condition of anonymity." Given her reference to him and to a then-recent dissenting opinion he wrote, Mann suspects the anonymous judge was Easterbrook when asked to comment about Mann's submitted article.

ARTICLE

Less than three months before the conclusion of the current U.S. Supreme Court term, the most anticipated end-of-term event is not the outcome of a particular abortion rights or affirmative action or states' rights or property rights "takings" case.

Well, not one argued to the court this term, anyway.

No, the climactic moment that all interested parties – a term I use advisedly here – await with bated breath is the expected final-day announcement by Chief Justice William Rehnquist or Associate Justice Sandra Day O'Connor, or both, of his/her/their retirement from the court.

And among the most interested of those parties (remember, this is a term I use advisedly) are the large handful of justice wannabes who have a genuine shot at nomination, a group widely thought comprised almost exclusively of federal appeals court judges who were appointed by Presidents Ronald Reagan or G. H. W. Bush at the behest of the Federalist Society.

The Federalist Society, for those in the dark, is a national bar association that for the past two decades has engaged in a vast right-wing conspiracy to co-opt the federal bench and, derivatively, federal law. For those still in the dusk who wish further enlightenment and have an Internet connection, I recommend the Society's web site, at www.fed-soc.org. Its chain links (O.K., hyperlinks) clarify that the Society's objective is nothing less than the transformation of the federal appellate and Supreme Court benches into a bicameral rightist quasi-legislature.

Its *modus operandi*: the tandem appointment to the bench of its members and sympathizers and the (sometimes *pro bono*) legal representation by some of its members of litigants who are challenging laws and government policies that the political right disfavors.

In recent years, Society members have represented the plaintiffs in many of the highest-profile "takings" and "reverse discrimination" cases, for example, and petitions to the Supreme Court filed by activist Society members seem always to receive the attention, and the vote, of Justices Scalia, Thomas and Kennedy, each of whose nomination to the court was sponsored by the Society. Those three justices, and Society-sponsored appeals court judges around the country, hire their law clerks (a.k.a. their petition screeners and opinion ghostwriters) largely from a pool developed by the Society's elaborate farm system – its law school Student Chapters, which, according to the "How to Form and Run a Federalist Society Student Chapter" hyperlink on the web site, currently number more than 140. And they're metastasizing yearly, apparently, not only in the number of chapters, which happily must be finite, but in per-chapter membership, which apparently is not; the Society's job-opportunities networking activities presumably are a draw.

This incestuous relationship between the Society and the top layers of the federal bench resulted only last month in the Supreme Court's decision to hear, for the third time, arguments on behalf of one Adarand Constructors, Inc., which is challenging a Colorado state-sponsored affirmative action "set-aside" program. (The court twice had reversed an appeals court's rulings against Adarand, each time remanding the case to that appeals court, which stubbornly keeps ruling against Adarand.) And the relationship also resulted, a year ago, in an angrily worded dissent by Justices Scalia, Thomas and Kennedy from the court's *refusal to hear* the appeal of a plaintiff in a garden-variety zoning "takings" case, a case called *Lambert v. San Francisco*; the lower appeals court's opinion in that case had misrepresented the *evidentiary* record, Scalia wrote, hardly a usual basis upon which the court agrees to hear a particular case.

But the Society succeeded only partially during the 1980s in packing the federal courts with its proxies. Now, though, according to numerous recent news media reports, the Society's members are the ones at the White House formally screening candidates for the appellate bench. Or, to borrow language from the published letter sent by White House Counsel Alfredo Gonzales to American Bar Association president Martha Barnett last month informing her of the Administration's decision to end the ABA's longstanding involvement in the vetting process, the current White House has granted "a preferential, quasi-official role to a group ... that takes public positions on divisive political, legal, and social issues that come before the courts."

Oops – make that a preferential *outright* official role that the White House has granted to this group. The Society members involved in the formal evaluation process now hold official government positions, in the Office of White House Counsel and the Department of Justice, rather than the merely quasi-official positions that the ABA judicial screening

committee members held. And rather than just evaluating candidates whose names are submitted to it, it is the Society's members themselves who likely are *initiating* the formal candidacies by *suggesting* the names for initial consideration.

The Society, in other words, has commandeered the selection process. It matters in its effect not at all that it is only Society members and not the formal Society apparatus itself that officially have acquired this power. There's nothing quasi about the official nature of their, and therefore of its, role.

The aforementioned justice hopefuls on the federal appellate bench know this; actually, they expected it and have counted on it. For years now they have engaged in a weird, barely veiled competition among themselves in which they jockey for the attention and favor of the Society's leaders by serving as speakers at or attending the group's annual convention in Washington, D.C., and its many symposiums held at various localities each year, usually at law schools.

And, more significantly, by drafting appellate opinions that tailor the law to the Society's specifications or that advocate for a change in the law that the Society would approve.

And so I was not surprised at the article heading in a recent edition of a local legal trade journal here in Chicago that read, "Dissent urges new approach for workers' claims of bias," above the byline of that journal's federal courts staff writer. The dissent at issue was in a case called *Gordon v. United Airlines, Inc.*, and argues for the demise of what is known as the *McDonald Douglas* "burden-shifting" test, established by the Supreme Court nearly two decades ago as a means by which employers who do not admit to unlawful employment discrimination may still be held legally accountable for their unlawful employment discrimination on

the basis of circumstantial evidence, the same type of evidence routinely used to convict criminal defendants beyond a reasonable doubt who have not confessed to the crime. In employment discrimination cases, that circumstantial evidence may be, for example, that the employer's stated reason for its action against the plaintiff lacks credibility.

The plaintiff must, of course, be a member of a class of persons, such as a racial minority, that the law protects against employment discrimination, and he or she must have met the employer's basic job performance standards yet suffered a negative job action at the hands of the employer. Under the *McDonnell Douglas* test, once the plaintiff provides evidence of these essentials, the burden shifts to the employer to show a legitimate nondiscriminatory reason for the negative action.

The dissenter in *Gordon* was Judge Frank H. Easterbrook, a leading justice/chief justice sweepstakes contestant. According to a published report compiled by the Community Rights Counsel, a Washington, D.C., public interest law firm that has examined records of privately funded trips taken by federal judges, Judge Easterbrook during an eight-year period in the 1990s addressed or attended twelve conventions and symposiums sponsored by the Federalist Society or one of its local chapters and was reimbursed by the organization for his travel expenses to each. Society web site postings also list him as a speaker at the organization's Annual National Student Symposium last month and in each of the last two years, including as the banquet keynote speaker at last year's event. And although he did not address the Society's annual lawyers convention in November, 1999, he did make his attendance there well enough known that he was mentioned in a May, 2000, *Washington Monthly* magazine article about that convention as a luminary there.

Judge Easterbrook writes in his dissent in *Gordon*, "Only a lawyer trapped in a warren of 'tests' and 'factors'

could make such a connection. Everything true about Gordon is true about United's other employees; can *all* of them be victims of discrimination?" Gordon, an African-American probationary flight attendant in his 40s, had been fired and was alleging differential treatment and that race and age discrimination were the motives.

Judge Easterbrook proposes that the *McDonnell Douglas* test be replaced with a two-pronged one that I will call the "reasonable-aspiring-Supreme-Court-justice" test, which, if I understand it correctly, goes something like: (1) Might an occasionally reasonable Judge Easterbrook believe that the employer was lying about its reason for taking the negative employment action, and, (2) if so, would that same Judge Easterbrook believe that the employer lied in order to cover up an unlawful discriminatory motive?

I think this test is offered as a variation on the "reasonable juror" burden-of-persuasion standard reiterated so often by appellate judges in their opinions, at least as lip service.

Please don't misunderstand. I don't discount the possibility that that judge genuinely believes that all United flight attendants were black, older than 40 and fired. It's just that I think it's possible that he might not. And although in his impeccably timed dissent he professes doubt that any employer actually would *lie* to the court to avoid liability for unlawful conduct, I think he may suspect that this does occur on occasion.

And so I have concluded that some sort of judicial credibility burden-shifting test is in order here. But then, I'm not an appellate judge.

This is the New York Times article referenced in the head note to App. V.

April 18, 2001

A Conservative Legal Group Thrives in Bush's Washington

By NEIL A. LEWIS

WASHINGTON, April 17 — The Federalist Society was founded almost 20 years ago by a handful of conservative law students who felt that they were a beleaguered minority at their elite schools, isolated and even disdained in a dominant liberal intellectual environment.

Today, the society's status and influence are vastly different.

The organization counts among its 25,000 members some of the most influential officials in the Bush administration. Many federal judges are ardent supporters. And of the 70 candidates interviewed so far by the Bush administration for appointment to the bench, about a fourth of them were recommended by the Federalist Society's Washington headquarters, administration officials said.

When President Bush puts forward his first group of judicial nominees in the coming weeks, Federalist Society members are expected to be among them, including Peter D. Keisler, a Washington lawyer and longtime leader of the society who is expected to be named to the United States Court of Appeals for the Fourth Circuit, in Richmond, Va.

At the same time, one of the founding father figures of the Federalist Society, Theodore B. Olson, a longtime trustee of

the group, has been selected as the United States solicitor general, the person charged with articulating the administration's policy before the Supreme Court.

The Federalist Society for Law and Public Policy Studies, as it is formally called, takes its name from the Federalist Papers, the political tract of the founding fathers. Some members are staunch conservatives who believe the "original intent" of the Constitution should guide the law, others are libertarians who champion individual rights and disdain big government.

Most Federalists are practicing lawyers, many based in Washington, who pay $25 annually, as compared with $5 for students, and who attend regular conferences devoted to some aspect of the law. The society's panels scrupulously include liberals as well as conservatives from its own ranks. The Federalists' annual convention is a major event among conservatives.

"The Federalist Society has, in recent years, become a significant player in setting the terms of the public policy debate, not only in the law schools but in the highest circles of government," said Prof. Dennis Hutchinson of the University of Chicago Law School.

In the Bush administration, lawyers closely involved with the Federalist Society fill the Office of the White House Counsel while other Federalists occupy important non- legal posts; former Senator Spencer Abraham, who was a founder of the society at Harvard Law School, is the new secretary of energy.

The group's budget has grown, too, with annual financing of just under $3 million in the last two years, much of it from donations by conservative foundations like the John M. Olin Foundation, the Lynde and Harry Bradley Foundation, the Sarah Scaife Foundation and the Richard and Helen DeVos Foundation.

During the Clinton years the Federalist Society drew attention because Kenneth W. Starr, the independent counsel who led the Whitewater and Monica Lewinsky investigations, some of the lawyers in his office and some of the lawyers who worked on the Paula Corbin Jones sexual misconduct case against President Bill Clinton were active in the Federalist Society.

Membership in the group at law school has become an important credential for obtaining coveted clerkships with many conservative appeals court judges who, in turn, are able to promote some of those ideological protégés to clerkships at the Supreme Court. These jobs are greatly important in advancing to public policy positions. While there are liberal counterparts, they are not involved in such intense networking.

One prominent appeals court judge acknowledged in an interview that he was interested in hiring clerks who shared his conservative philosophy. The judge, who spoke on condition of anonymity, said that "a clerkship is a useful credential and if I want to advance my philosophy I'd rather give it to someone who thinks like me." As a result, the judge said, he gives preference to students who list membership in the Federalist Society on their applications.

The success of the Federalist Society has provoked some harsh reactions and dire warnings from liberal groups. When the Bush administration last month ended the American Bar Association's role in evaluating federal judges, it delighted many Federalist Society members who had yearned for such a move.

The Federalist Society had taken on the bar association as a target in its publications, an outgrowth of the resentment conservatives have felt about the lawyers' organization since 1987 when it gave a mixed evaluation to Judge Robert H. Bork's candidacy for the Supreme Court. Judge Bork, who

was rejected by the Senate after a bruising confirmation battle, is co-chairman of the Federalist Society's Board of Visitors.

While Federalist Society members cheered the bar association's ejection, Ralph G. Neas, the president of People for the American Way, a liberal interest group, complained that, "This shows how the right-wing Federalist Society is calling the shots in the Bush White House."

The Institute for Democracy Studies, a liberal studies group in New York, is monitoring the number of prominent Federalist Society members in prominent positions in the Bush administration.

One senior Senate staff aide who is a Democrat said that she and her fellow lawyers in Congress were alarmed at the Federalists' increasing influence. "But it's hard to know what to do without sounding like `are you now or have you ever been a member of the Federalist Society,' " she said, acknowledging that criticism of the group might border dangerously close to intolerance.

Eugene B. Meyer, the longtime executive director of the Federalist Society, said that the characterization of the group as a closed society with a secret, right-wing agenda was "one I object to vociferously."

Mr. Meyer added, "Our doors are open, our programs are open and people from all across the political spectrum are featured speakers at them."

He described the Federalists' main purpose as to debate its core beliefs, which he described as pro individual rights and anti big government.

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Timothy Flanigan, the deputy White House counsel, said he was deeply troubled by the suspicious views held by some about the Federalists, likening it to a kind of left-wing McCarthyism.

"This is not a society that sits around and plots the overthrow of the Constitution, it is a group of lawyers with a diversity of viewpoints who tolerate other views and who encourage debate," Mr. Flanigan said. "I find it offensive someone should suggest something nefarious about this group."

Mr. Flanigan is not a member of the Federalist Society but has had a strong association with the group. Before he joined the Bush administration, he was working on an authorized biography of Warren E. Burger, the late chief justice, for whom he was a clerk and the Federalist Society administered the financing for the project.

Mr. Meyer said the benefactors of the project, chiefly Dwight Opperman, a legal publishing magnate, wanted to have a nonprofit organization administer the money so his donation could obtain a tax benefit.

More than $600,000 has been administered by the society over the last few years for researchers, expenses and a salary for Mr. Flanigan, roughly equivalent to his salary at the New York law firm he left to work on the project. The book is about two-thirds complete and Mr. Flanigan has put it aside to work for the government.

But while neither Mr. Flanigan nor his boss, Alberto R. Gonzales, the White House counsel, has been active in the Federalist Society, several of the associate White House counsels including Brett Kavanaugh have been involved. Mr. Kavanaugh also worked as a senior deputy to Mr. Starr, when he was the Whitewater special prosecutor. Of the six associate

counsels, most have been actively involved in the Federalist Society, Mr. Meyer said.

The society's founders have played other prominent roles in Washington. Lee Liberman Otis, served in the White House counsel's office in the first Bush administration and played a major role in selecting judges. Ms. Otis is now slated to be general counsel at the Energy Department.

Mr. Meyer said that the prominence of many Federalists in Republican administrations is less evidence of the group's clout than the fact that it attracts conservatives who are inclined to public service. "The main reason these people get these jobs is because they're interested in public policy," he said. "These are people who want to affect society."

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This order is discussed in the Petition at p. 26.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BEVERLY MANN, Plaintiff,	)	
vs.	)	CASE NO. 94 C 11020
CITY OF CHICAGO, ILLINOIS ILLINOIS, HAROLD WASHINGTON, JAMES MONTGOMERY, TIMOTHY O'HARA, and JAYNE BARNARD, Defendants.	)	

MEMORANDUM OPINION AND ORDER

DOCKETED

JUL 1 1 2001

MURPHY, Visiting Chief District Judge:

This matter came before the Court on July 3, 2001, for a hearing on all pending motions specifically, Plaintiff s various motions to vacate certain orders and judgments under Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6). As an initial matter, the Court notes that during the hearing, Defendants' motion for leave to file their response to Plaintiffs motions (Doc. 649) was GRANTED, and the Court has considered that response (Doc. 650). Additionally, Plaintiffs motion for a certificate of necessity (Doc. 653) is DENIED as moot

because Circuit Judge Frank H. Easterbrook already denied that request (see Doc. 654). Plaintiff s motions to vacate filed on January 10, 2001, (Doc. 640) and January 16, 2001, (Doc. 638) appear identical, with the exception that the motion filed on January 10, 2001, does not bear a signature. Therefore, the Court will consider the signed January 16, 2001, motion (Doc. 638), and the January 10, 2001, motion (Doc. 640)'ls DENIED as moot. Similarly, on July 12, 2000, Plaintiff filed a "Corrected Motion" (Doc. 619), modifying the motion previously filed on July 6, 2000 (Doc. 618). Therefore, the Court will consider the July 12, 2001, corrected motion (Doe. 619), and the July 6, 2000, motion (Doc. 618) is DENIED as moot.

Rules 60(b)(5) and 60(b)(6) provide, in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Cir. P. 60(b). While Rule 60(b) specifically authorizes a district court to relieve a party from a final judgment under a variety of circumstances, "the need for the finality of judgments is an overarching concern." *Cincinnati Ins Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7'a Cir. 1997). "Rule 60(b) sets a higher value on the social interest in the finality of litigation." Id. (internal quotation omitted). Therefore, it is "very well established that Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances." *McCormick v. City of Chicago*, 230 F.3d 319, 327 (7'° Cir. 2000) (internal quotation omitted). The basis for

vacating a judgment under Rule 60(b) "must be something that could not have been used to obtain a reversal by means of a direct appeal." *Bell v Eastman Kodak Co.*, 214 F.3d 798, 801 (7'" Cir. 2000).

The procedural history of this case has been well documented and summarized in various orders throughout the file, and the Court finds no reason to reiterate it here. This Court has carefully considered Plaintiffs numerous Rule 60(b) motions (Docs. 612, 619, 623, 638, 652), the various supplemental pleadings and exhibits filed in support of those motions (Docs. 608, 609, 610, 611, 613, 625, 626, 627, 633, 634, 636), Defendants' response in opposition to the motions (Doc. 650), and Plaintiffs reply in support of the motions (Docs. 631, 632). For the reasons fully set forth on the record during the July 3, 2001, hearing, the Court finds that no exceptional circumstances exist to warrant relief under Rule 60(b). Accordingly, Plaintiffs motions to vacate various orders previously entered in this action pursuant to Rules 60(b)(5) and 60(b)(6) (Docs. 612, 619, 623, 638, 652) are hereby DENIED.

Moreover, as set forth on the record during the hearing, Plaintiff is hereby PERMANENTLY ENJOINED from filing any papers whatsoever in any federal district court involving or arising out of the matters alleged in this action, civil case number 84 C 11020, without first making an application to the undersigned District Judge and being granted leave of Court to file such papers, with the sole exception that Plaintiff need not seek leave of Court to file a notice of appeal from this Memorandum and Order. See, e. g., *Malley v. New York City Bd of Educ.*, 112 F.3d 69 (7h Cir. 1997), citing *In Re Martin-Trigona*, 737 F.2d 1254,1262 (2d Cir.1984) (approving injunction restricting new actions in all federal courts). This injunction similarly applies to any pleadings, save a notice of appeal, sought to be filed in this action. In reviewing any request for leave to file such papers, the Court will closely

scrutinize the pleading sought to be filed, and if it is found to be frivolous, severe sanctions will be imposed. In light of the considerable expense already incurred by Plaintiff in trying to keep this action viable, the Court finds that the imposition of monetary sanctions will not deter her from filing frivolous pleadings. Therefore, should Plaintiff fail to comply with this Order by attempting to file a frivolous pleading or by failing to seek leave of Court altogether, the sanction will be imprisonment. Although an extreme remedy, imprisonment is warranted in this case considering Plaintiffs incessant demand for and consumption of judicial resources over the past seventeen years and her obvious lack of respect for the judicial process, which is abundantly evident from her pleadings. See, e.g., *Support Sys Int'l, Inc. v Mack*, 45 F.3d 185, 186 (7"' Cir. 1995) (holding that sanctions must be tailored to provide the most effective form by which a court can exercise its judicial authority to curb inappropriate behavior and abuse of its processes). Moreover, this Court's previous Order REMAINS in effect, such that Plaintiff SHALL NOT verbally contact the United States District Courts for the Northern and Southern Districts of Illinois to inquire about her case in an effort to circumvent the leave-of-Court filing requirement. Similarly, Plaintiff SHALL NOT, under any circumstances, verbally contact the Chambers of the undersigned. Plaintiff's failure to comply with this Order in any respect shall result in the sanction of imprisonment.

The Clerk of this Court is DIRECTED to send a copy of this Memorandum and Order to all United States District Court Clerks. The undersigned shall be notified immediately if Plaintiff fails to comply with this Memorandum and Order.

Finally, "lest (Plaintiff] misconstrue[s]" this Court's ruling, for reasons made eminently clear during the hearing, "this litigation is over." *Berwick Grain Co. v. Illinois Dep't of Agric.*, 217 F.3d 502, 506 (7* Cir. 2000).

IT IS SO ORDERED. DATED this ___ day of

July, 2001.

G. Patrick Murphy

HV
District Judge

G. PATRICK MURPHY
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEVERLY B. MANN, Petitioner	)	
	)	No.
v.	)	
AURELIA PUCINSKI, AS CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, AND COOK COUNTY, ILLINOIS	)	

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Beverly B. Mann, *pro se*, petitions this court for a writ of mandamus and prohibition against Aurelia Pucinski, as Clerk of the Circuit Court of Cook County, Illinois, and Cook County, Illinois, as follows:

I. JURISDICTION

Jurisdiction is based upon federal questions presented by virtue of the Fourteenth Amendment to the Constitution of the United States and Title 42 of the United States Code, Section 1983. Jurisdiction is statutorily conferred by Title 28 of the United States Code, Sections 1331 and 1343.

II. VENUE

Venue is proper in this District pursuant to 28 U.S.C. § 1391, as the petitioner and the respondents each reside within the District and the events upon which this petition is based have occurred and will occur within the District.

III. PARTIES

The petitioner, Beverly B. Mann, is a resident of Chicago and Cook County, Illinois. Respondent Aurelia Pucinski, is the Clerk of the Circuit Court of Cook County, Illinois. Cook County, Illinois, is a local governmental entity.

IV. RELIEF SOUGHT AND BASIS FOR PETITION

A. INTRODUCTION AND BACKGROUND

By this petition, Beverly Mann seeks a finding by this court that section (k)(4) of the Illinois Clerks of Courts Act, 705 ILCS l05/27.2a(k)(4), violates Section 1 of the Fourteenth Amendment to the Constitution of the United States. 705 ILCS 105/27.2a(k) reads, in total:

l05/27.2a. Fees-Counties of 3,000,000 or more

§ 27.2a. The fees of the clerks of the circuit court in all counties having a population of 3,000,000 or more inhabitants in the instances described in this Section shall be as provided in this Section. The fees shall be paid in advance and shall be as follows:

(k) Certification, Authentication, and Reproduction.

(2) Court appeals when original documents are forwarded, under 100 pages, plus delivery and costs; $75.

3) Court appeals when original documents are forwarded, over 100 pages, plus delivery and costs, $150.

(4) Court appeals when original documents are forwarded, over 200 pages, an additional fee of 25 cents per page.

Mann is the plaintiff in a pharmaceutical products liability lawsuit pending until recently in the Circuit Court of Cook County, Illinois, captioned *Beverly B. Mann v. The Upjohn Company*, No. 92 l 13054. The lawsuit was dismissed upon procedural grounds on April 23, 1998, the date that trial was to begin.

Mann is a non-practicing attorney who was litigating that lawsuit *pro se*. Beginning on July 1, 1997, she filed a succession of motions for trial date extension of sufficient length to enable her to retain counsel to try the case on her behalf and to help defray the further costs of the litigation, which she could not afford. Mann had asked for a trial date continuance of four months. Her motions were denied, apparently upon the basis of local Cook County Circuit Court Rule 5.2, which contains a blanket prohibition of trial date continue to enable the substitution or addition of counsel.

A series of brief, incremental trial date continuances were given for other narrow purpose, including a two-month continuance that Mann used to obtain a tentative commitment for representation at trial. That trial date then was advanced, and that counsel withdrew their offer of representation.

On April 23, 1998, Mann, unable to try the case *pro se*, allowed it to be dismissed for want of prosecution. Among the many issues on appeal is the federal and state constitutional propriety of Cook County Circuit Rule 5.2 and the propriety of that Rule in light of a particular Illinois state statute, 735 ILCS 5/2-1007.

On July 1, 1998, Mann filed a timely notice of appeal. On July 13, 1998, the defendant, The Upjohn Company, filed a notice of cross appeal. By Illinois Supreme Court Rule, the court record was due to be prepared and transferred to the appellate court clerk's office on or before September 14, 1998.

Mann attaches a copy of the appellate docketing sheet she filed in the case as Exhibit 1. The docketing sheet summarizes the case and the issues she raises on appeal.

On September 14, 1998, Mann received a phone call from Patricia Formusa, supervisory clerk for preparation of Cook County Law Division court records for appeal. Ms. Formusa told Mann that, pursuant to 735 ILCS 105/27a(k), Mann must pay the clerk $1,543.75 (in addition to the $75.00 she already had paid as a required deposit) before the court record would be released for delivery to the appellate court. As quoted above, that statute contains a fee schedule based upon the number of pages in the record, and (notwithstanding that this lawsuit was not tried), the court record in Mann's litigation contains 6,075 pages.

Mann then brought a motion to compel the release of the court record for appeal. She presented it to Cook County Circuit Judge Susan Zwick, who had presided in the underlying lawsuit. Judge Zwick said that the only basis provided by Illinois law upon which such a motion can be based is Illinois Supreme Court Rule 298. That Rule reads:

Rule 298. Application to Sue or Defend as a Poor Person

(a) Contents. An application for leave to sue or defend as a poor person shall be in writing and supported by the affidavit of the applicant or, if the applicant is a minor or an incompetent, by the affidavit of some other person having knowledge of the facts, stating:
(1) the applicant's occupation or means of subsistence;
(2) the applicant's income for the year preceding the application;
(3) the source and amount of any income expected by the applicant;
(4) the nature and value of any property, real or personal, owned by the applicant;
(5) the particulars of all applications for leave to sue or defend as a poor person made by the applicant or on his behalf during the year preceding the application;
(6) that the applicant is unable to pay the costs of the suit; and
(7) that the applicant has a meritorious claim or defense.

(b) Ruling. If the application is denied, the court shall endorse the fact of denial on the application. If the application is granted, the court shall enter an order allowing the applicant to sue or defend as a poor person.

Mann now challenges 705 ILCS 105/27.2a(k)(4) as violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

B. RELIEF SOUGHT

The court record in Mann's lawsuit already has been prepared for appeal. Mann therefore seeks an immediate temporary restraining order prohibiting the Clerk of the Circuit Court of Circuit Court of Cook County, Illinois, from withholding the prepared court record from release for transfer to the appellate court for appealte review, thus enabling the appeal in her lawsuit to proceed without further delay. Ultimately, Mann seeks a finding that the challenged-statute indeed is unconstitutional, as she asserts.

She also seeks reimbursement for the filing fees for this petition, $150.00.

C. GROUNDS FOR RELIEF

Illinois law requires that court record in any litiagation on appeal must be provided to the appellate court in order to enable appellate review. Subsections (k)(2) and (3) of 705 ILCS 105/27.2a provide a specified fee amount, a maximum of $150.00, to be paid to the court clerk for the preparation of court records on appeal for records containing less than 200 pages. The court fees required by those subsections appear to reasonably reflect the defraying of the costs to the clerk's office for the service provided and do not represent a facially prohibitive expense as a prerequisite to access to the appellate court.

Subsection (k) (4), on the other hand, contains no ceiling for the amount of the prerequisite court fees, and mandates the payment of exorbitant court fees as a prerequisite to appeal in some lawsuits, fees that cannot be justified as mere reimbursement to the county for its expenses for providing the service. As such, the fees significantly circumscribe the right to access to the Illinois appellate court for persons of modest financial means.

The fees therefore constitute, for them, a denial of due process of law, a denial of the equal protection of the laws, and (for United States citizens) an abridgement of a privilege of citizens of the United States.

Mann is a citizen of the United States and is not wealthy.

The Fourteenth Amendment, Section 1, provides:

> Amendment XIV.
>
> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mann expects that her lawsuit eventually will be tried and that appeal will be taken from the jury verdict. Given the nature, complexity and number of issues in the case, the court record upon appeal after trial, including the trial transcript, various (and numerous) pretrial and trial motions, jury instructions and trial exhibits, easily could double its current volume. If so, 705 ILCS 105/27.2a (k) (4) would mandate the payment of more than $3,000.00 as a prerequisite to appeal.

On September 17, 1998, Mann went to the Law Division Clerk's office and spoke with a deputy clerk who

prepares court records for appeal. She asked him what, exactly, the clerks do to prepare court records for appeal. He told her that they take the original court record, sort the documents, number the pages and bind them. He showed Mann sample binders filled with prepared court documents. The binders are cardboard and have a two-hole metal paper-binder apparatus at the top, and appear to each hold a group of documents approximately one inch thick. Mann estimates the wholesale cost of the binders at about $.25 per binder, at a maximum.

Upon Mann's questioning, the clerk conceded that the purpose of the numbering of the documents was not to index them, inasmuch as no document index is made, but solely to determine the payment due pursuant to 705 ILCS 105/27.2a (k) (2), (3), and (4).

By Mann's calculation, 705 ILCS 105/27.2a (k) (4), then, mandates a charge of more than $200.00 per hour for the services of a clerk to sort court documents and place them into cardboard binders, a fee rate that not even the most expensive law firms charge their clients for the services of their paralegal and clerical staff. (Mann's calculation presumed that one clerk would take one full day to prepare the record in her lawsuit. The clerks work six- and one-half-hour days.)

As Cook County (presumably) does not pay its clerks at rate of more than $200 per hour, the County or its Clerk's office reaps a substantial monetary windfall as a result of that statutory subsection. The fee unarguably is disproportionate to the work performed and the costs to the county, as evidenced by the flat, statutory court fee of $100 in federal court for the identical service: the preparation of a court record for appeal.

The challenged statutory subsection, then, constitutes a mechanism for a general revenue tax, levied without justification only upon certain appellant litigants. It is a discriminatory tax unjustified by any rational or legitimate governmental purpose.

Illinois Supreme Court Rule 298 provides a means for the waiver of the fees to persons who qualify within that Rule as a poor person. One need not be a poor person, however, to sustain financial hardship upon the payment of so steep a court fee for nothing more than the sorting and binding of the documents in the court record, and the usurious fee may well serve as a practical bar to appeal for many persons other than those who qualify as poor persons, particularly in light of necessary other expenses of appeal.

Further, Rule 298 requires the public disclosure of personal financial information, disclosure that appellants should not be forced to make in order to avoid payment of an exorbitant and unjustifiable court fee. Such disclosure is appropriate when a litigant seeks waiver of court fees that represent the reimbursement to the court system of its actual expenses for the service it provides to the litigant; it is not appropriately required for a waiver of a discriminatory general revenue fee or tax, as the fee at issue constitutes.

D. NEED FOR IMMEDIATE RELIEF, ABSENCE OF PERMANENT HARM TO COOK COUNTY, AND LIKELIHOOD THAT THE CHALLENGED STATUTE ULTIMATELY WILL BE HELD UNCONSTITUTIONAL

Mann has been told by a clerk at the office of the clerk of the Illinois Appellate Court, First, District, that appeals before that court often take two or more years to resolve. Unlike federal law, Illinois state law provides the appellate court with no mandamus authority, thus Mann would have to file a motion or separate proceeding seeking a finding that the challenged statute is unconstitutional, and then, if unsuccessful, file a separate appeal that would have to be resolved before she could proceed with the underlying appeal, an approximately four year process of appeals.

Alternatively, she would have to pay the $1,543.75 court fee or waive her right to appellate review.

The county, and its clerk's office, on the other hand, will suffer no harm if the court record in Mann's lawsuit is mandated released. The record already has been prepared for appeal, and, as Mann does not challenge the statutory court fee of $150.00 for the work performed, the county will suffer no monetary harm.

In the two weeks following September 16, 1998, when she first learned of the statutory fee encumbrance to appellate review in her lawsuit, she has filed five motions with judges in the Law Division of the Circuit Court of Cook County, each motion asserting that the statue violated various sections of the Constitution of the State of Illinois, including a section prohibiting the denial of due process of law and of the equal protection of the laws.

Notably, Mann provided notice of each of those motions to the office of Aurelia Pucinski, Clerk of the Circuit Court of Cook County, and, in follow-up phone calls, was assured that the notices were delivered to the appropriate persons. The Clerk's office nonetheless did not appear at any of the hearings, an indication that Ms. Pucinski, at least, agrees that the challenges the statutory subsection is constitutionally indefensible.

In seeking a hearing on her motions, Mann was bounced from one judge to another and, tired of the treadmill and unable to obtain a substantive hearing there, she filed this petition.

V. CONCLUSION

So significantly does the challenged statutory subsection, 735 ILCS 105/27a (k) (4), circumscribe the right to appeal in lawsuits with large court records that it appears axiomatic that it denies to litigants of modest financial means both due process of law and the equal protection of the laws in violation of the Section 1 of the Fourteenth Amendment to the Constitution of the United States. So clearly does that statutory subsection provide the County with a financial

windfall far beyond reimbursement for its expenses that it certainly constitutes a discriminatory mechanism for raising general revenue for which no rational governmental purpose exists.

As such, it denies the equal protection of the laws to appellant litigants for whom, by virtue of the size of the court record upon appeal, the payment of the fee is a prerequisite to access to appellate review in Illinois state court.

Respectfully submitted,

Beverly Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEVERLY B. MANN, Petitioner, -vs-	)	Docket No. 9 8 C 8004
AURELIA PUCINSKI, as Clerk of the Circuit Court of Cook County, Illinois and COOK COUNTY, ILLINOIS, Respondents.	)	Chicago, Illinois September 30, 1999 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARRY D, LEINENWEBER

APPEARANCES:

For the petitioner:

MS. BEVERLY B. MANN, pro se
7261 North Campbell Avenue
Chicago, Illinois 60645

For the Respondents:

MS. MARY MALLO
(Cook County State's Attorney's Office
Room 500, Richard J. Daley Center
Chicago, Illinois 60602)

Court Reporter:

JAMES W. CHEEK
Official Reporter UNITED STATES DISTRICT COURT
219 S. Dearborn St. – Rm. 1944
CHICAGO, ILLINOIS 60604

THE CLERK: 98 C 8004, Mann v. Pucinski.

MS. MANN: Good morning, I'm Beverly Mann, the plaintiff.

MS. MALLO: Good morning, your Honor. Mary Mallo, M-a-1-1-o, Assistant State's Attorney on behalf of the defendant.
MS. MANN: This is a motion pursuant to Federal Rule of -- actually, the title is wrong. It is the Federal Rules of Civil Procedure. It should say Federal Rules of Appellate Procedure -- for leave to file a late notice of appeal. It is also a motion pursuant to Federal Rule of Civil Procedure 60(b) to vacate your August 3rd, 1999 order dismissing the lawsuit. According to a paragraph in the Seventh Circuit Court of Appeals –

THE COURT: Let me ask you a question. You claim to be a lawyer, right?

MS. MANN: I am a lawyer, yes.

THE COURT: Did you go to law school?

MS. MANN: Yes, I did

THE COURT: What.law school?

MS. MANN: Washington University in St. Louis.

THE COURT: Did you graduate?

MS. MANN: Yes.

THE COURT: Are you a member of the Bar?

MS. MANN: Yes.

THE COURT: Has anybody ever told you that you should read a case that you cite?

MS. MANN: Yes.

THE COURT: Have you ever read the cases you cite?

MS. MANN: Yes.

THE COURT: You cited Adams vs. City of Chicago.

MS. MANN: Adams vs. City of Chicago?

THE COURT: Yes.

MS. MANN: I cited –

THE COURT: For the proposition: (Reading)
"[when a preliminary injunction has been appealed and a new motion for preliminary injunction is filed, there is no jurisdictional bar to the district court resolving that motion..."

MS. MANN: I'm sorry. I cited Shevlin vs. Schewe.

THE COURT: You have got it in here. Anyway, you added that case in this case –

MS. MANN: I didn't cite that case.

THE COURT: Maybe you should have. It is a Seventh Circuit opinion that is newer. It is only a year old. Let me just read. You are talking about this issue about preliminary injunction when it is on appeal.

MS. MANN: Right.

THE COURT: I am reading from Page 1,154, Footnote 4

(Reading:)
"These appeals would be mooted by either a final decision on the merits by the district court or the department's decision not to use the list." Et cetra
So, your appeal is moot. You didn't read the case.

MS. MANN: I haven't read the case. I am not familiar with the case but I can tell you this –

THE COURT: You cited it.

MS. MANN: I did not cite it. I didn't cite it.

THE COURT: Well, you should have.

MS. MANN: Okay. Maybe I think I probably should not have because I don't know –

THE COURT: Anyway, that motion –

MS. MANN: I don't think that -- Judge, Judge, if I read the other case, the case that I did cite, correctly, and what it says in the handbook itself because it is 1999 –

THE COURT: Well, you are a lawyer. Handbooks don't govern. You ought to know that.
The Seventh Circuit governs us, not the handbook. It is the decisions. The decision definitely says it will be mooted by a final decision. And I made a final decision.
Now you have another request –

MS. MANN: But you can't make a final decision on something that is already up on appeal. You are divested of jurisdiction to make a final decision. That's the way I understand it.

THE COURT: Anyway, that motion is denied.

I am going to charge you $100 costs to pay to the State's Attorney's Office for needless time they spent coming over on that one.

MS. MANN: I'm sorry. I have two motions here.

THE COURT: I am issuing a Rule 11 violation on the first one.
The second one –

MS. MANN: Actually, that was the second one.

THE COURT: Okay. The second one is the Rule 11 violation.
Now you are back to your first-one. You want leave to appeal, late notice of appeal, under Appellate Rule 4.

MS. MANN: Right.

THE COURT: Do you want to be heard on that?

MS. MALLO: Judge, counsel's claim is that she did not receive notice. My understanding is she made that statement in court the other day that she had received notice on every other issue. This is a case where she was acutely aware of every decision the Court had issued and very litigous in her filing of motions and her filing of a notice of appeal on the preliminary injunction. I would just suggest that counsel should be barred from being allowed to file this appeal at this time.

MS. MANN: I haven't the slightest idea of what the relevance is of the number of motions that I filed. When I file a motion I appear in court. I know that I filed a motion. I know there is going to be a hearing.

I was given no notice that there was going to be a hearing at all any time when it was given. I was actually told

specifically several months before that by your law clerk on the phone that -- the way she put it was that you would send me a copy of the ruling by mail, which I took it to mean that the minute clerk would send it and your minute clerk did not send it. I did not receive it. I signed an affidavit to that effect. There is no reason in the world, logical reason, why, had I received it, I would not have filed a motion -- I'm sorry -- a new notice of appeal. I didn't receive it.

THE COURT: Wanda, do we have any way of checking one way or another?
According to the thing she filed, it was checked, "docketing to mail notice."

THE CLERK: That is correct. If I put through a memorandum opinion and order I would check "docketing to mail." I make the copy and it is forwarded to docketing and they mail it out.

THE COURT: So, we don't know whether they mailed it or not?

THE CLERK: Docketing would indicate whether it was mailed on the docket sheet. All I can say is, if the address was correct -- Ms. Mallo received hers -- I don't see why she would not have received it unless the Post Office may have messed up. I don't know. But when they mail it they do make an entry, "notice mailed."

THE COURT: Well, under Rule 4(a)(6): (Reading)
"...upon motion filed within 180 days of entry of the judgment..."
That has been satisfied. (Reading:)
"The district court, if it finds that a party entitle to notice ... but did not receive such notice... within 21 days after entry and the court finds no one would be prejudiced..."

Can you state what prejudice there is?

MS. MALLO: No, Judge.

THE COURT: All right. I will grant the motion.
1 will reopen the time to file an appeal for fourteen days from today.

THE CLERK: That will be October 14th.

THE COURT: That is based upon the sworn statement that Ms. Mann claims she didn't qet it.

MS. MANN: Your Honor, on the Rule 11 issue, since this was part of the same motion, part of the same hearing - Ms. Mallo didn't respond, file any response, it appears that there are no Rule 11 –

THE COURT: You should probably make the thing payable to me because it put me to a lot of -- I had to read the case because you never read anything you cite.

MS. MANN: I do read what I cite, Judge. I didn't cite that case. I didn't even know about that case.

THE COURT: Well, you should have because it was part of the document you filed.

MS. MANN: No, it wasn't.

THE COURT: It certainly was. I can read from it, if you want me to. You filed the document. I don't know if you called a -- (Reading:)
"When a preliminary injunction has been appealed and a new motion for preliminary injunction is filed, there is no jurisdictional bar to the district court resolving that motion; however, the district court's ruling may, as a practical matter,

moot an earlier ruling on, and also the appeal of, a preliminary injunction. Adams vs. City of Chicago."

Now, if you had read that case, the decision says it can be mooted by a final decision on the merits.

MS. MANN: But, your Honor, that is a new motion for preliminary injunction, which I did not file. You're wrong. You're absolutely wrong. Read what it says here. And then it says: (Reading)
"...as a practical matter --"

THE COURT: I am charging you $100 for –

MS. MANN: For your costs? For your time?

THE COURT: No, not for mine. For theirs. They had to come in --

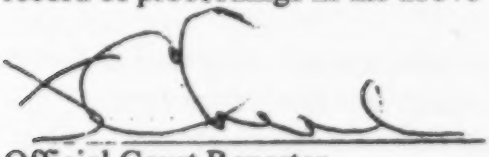
MS. MANN: What are her costs? She had to be here. She had to respond to the motion, for the other motion.

THE COURT: That is the ruling of the Court.

MS. MALLO: Thank you, your Honor.
(Which were all the proceedings had in the above-entitled cause.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



Official Court Reporter Date

Mann filed this response on Oct. 15, 2001. It is noted in the Oct. 16 order (App. C) barring her from ever again filing any documents with any federal court within the Seventh Circuit.

In the
United States Court of Appeals
for the Seventh Circuit

Beverly B. Mann,	)
Plaintiff-Appellant,	) Nos. 99- 1750
	) and 99-3595
v.	)
	) Dist. Court
Dorothy Brown, as Clerk of the Circuit	) No. 98 C 8004
Court of Cook County, Illinois, and	) .
and Cook County, Illinois,	) Hon. Harry D
Defendants-Appellees.	) Leinenweber

Response to Notice to the United States Court of Appeals for the Seventh Circuit and [Response to] Request for Leave to File Rule to Show Cause

Plaintiff-Appellant-Respondent-Perpetrator-Felon Beverly B. Mann, *pro se*, responds as follows to Defendant-Appellee-Victim Dorothy Brown's Notice to the United States Court of Appeals for the Seventh Circuit and/or Request for Leave to File Rule to Show Cause:

What, pray tell – no, make that prey tell – is a Rule to Show Cause filed by a *party* to litigation? To Mann's knowledge, issuances of rules to show cause are the province of courts, not of parties, although, of course, exceptions to any

rule of law can be made when Judge Easterbrook wants to make them.

And what, exactly, would this Rule to Show Cause require Mann to show cause for/about/why? Brown's request for leave to file it doesn't specify. But the clause "rule to show cause" usually is just preliminary to the remainder of the sentence in which it first appears, as in, "Accordingly, this court issues a rule to show cause why Beverly Mann should not be sanctioned with death by lethal injection for having periodically crossed Judge Frank H. Easterbrook, returnable within 14 minutes".

Further, mustn't Defendant-Appellee-Victim Dorothy Brown first file a successful motion to recall the mandate before she can file *anything* else with this court in this matter (other than a motion pursuant to Rule 53(d)(3) for publication of the two Rule 53 orders, a motion that Mann herself plans to file), now that the mandate has issued? Of course, exceptions to any rule of law can be made when Judge Easterbrook wants to make them.

As for the "notice" part of Brown's tendered document, Mann suggests that Brown instead place a notice in the "Personals" section of the Chicago Tribune or, better, in the "Personals" section of the National Enquirer. (Mann is not absolutely certain that the National Enquirer *has* a "Personals"

ad section; she'll have to investigate next time she's in the grocery-store checkout line.)

Having already been severely sanctioned for her failure to assert on behalf of the Defendants-Appellees-Victims a slew of nonexistent affirmative defenses not asserted on their behalf by their *actual* counsel of record (as opposed to Mann, who is not), Mann tenders this document in discharge of her obligation to represent her opponents.

OK, well, only in partial discharge of that obligation. Brown also seeks leave to file "any further relief this court deems fair and just." So Mann may now be ordered (either by this court or by Brown, who apparently has invested herself with judicial powers) to pay the market-value fees of her opponents' *real* attorneys in this matter: Judges Easterbrook, Manion and Kanne.

And given the astonishing success of their litigation strategy on Brown's behalf, Mann presumes their market value is paralyzingly high (if well worth the price). Mann's next court filing may be with the bankruptcy court – which, Mann has concluded, is Judge Easterbrook's predatory purpose.

One of them anyway. (For another one, Mann refers Brown to Judge G. Patrick Murphy, chief judge of the

Southern District of Illinois. His phone number is 618-482-9173.)

On the other hand, Brown seeks only further relief this court deems fair and just. That certainly would be novel. But if this court actually grants that request … it is Mann who will be receiving the check.

Initially Mann assumed she had no actual chance for full U.S. Supreme Court review, given the purposeful use here of C.R. 53 and the presumptive immunity (call it professional courtesy) conferred upon these Federalist Society jurists by their Supreme Court allies. But given two Supreme Court opinions issued on the same day last spring, and particularly given the unexpected makeup of the four-justice dissent in one of them, Mann now actually *expects* full Supreme Court review, even notwithstanding – and in fact partially because of – this court's transparently cowardly failure to make its numerous proclamations of law in this case precedent. And certainly they were not precedent earlier.

In *Rogers v. Tennessee*, 121 S. Ct. 1693 (May 14, 2001), the Court reaffirmed its pronouncement in *Bouie v. City of Columbia*, 378 U. S. 347 (1964), that due process prohibits the retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed

prior to the conduct in issue. Writing for the Court's bare majority, Justice O'Connor said:

> Our decision in *Bouie* was rooted firmly in well established notions of due process. See supra, at 5. Its rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct. See, e.g., 378 U. S., at 351, 352, 354, 354-355....
>
> [Our decisions] have uniformly viewed Bouie as restricted to its traditional due process roots. In doing so, they have applied *Bouie*'s check on retroactive judicial decisionmaking not by reference to the ex post facto categories set out in *Calder*, but, rather, in accordance with the more basic and general principle of fair warning that Bouie so clearly articulated. See, e.g., *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); *Marks v. United States*, 430 U. S., at 191-192 (Due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties); .... *Douglas v. Buder*, 412 U. S. 430, 432 (1973) (per curiam) (trial court's construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process); *Rabe v. Washington*, 405 U. S. 313, 316 (1972) (per curiam) (reversing conviction under state obscenity law because it did "not giv[e] fair notice" that the location of the allegedly obscene exhibition was a vital element of the offense).

Petitioner observes that the Due Process and Ex Post Facto Clauses safeguard common interests -- in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws. Brief for Petitioner 12-18. While this is undoubtedly correct, see, e.g., *Lynce v. Mathis*, 519 U. S. 433, 439-440, and n. 12 (1997), petitioner is mistaken to suggest that these considerations
compel extending the strictures of the Ex Post Facto Clause to the context of common law judging. The Ex Post Facto Clause, by its own terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text. It also would evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decision-making, on the other.

Petitioner contends that state courts acting in their common law capacity act much like legislatures in the exercise of their lawmaking function, and indeed may in some cases even be subject to the same kinds of political influences and pressures that justify ex post facto limitations upon legislatures. Brief for Petitioner 12-18; Reply Brief for Petitioner 15. A court's "opportunity for discrimination," however," is more limited than [a] legislature's, in that [it] can only act in construing existing law in actual litigation." *James v. United States*, 366 U. S. 213, 247, n. 3 (1961) (Harlan, J., concurring in part and dissenting in part). Moreover, "[g]iven the divergent pulls of flexibility and precedent in our case law system," ibid., incorporation of the Calder categories into due process limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system.

That is particularly so where, as here, the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging. In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of ex post facto principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles. It was on account of concerns such as these that Bouie restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U. S., at 354 (internal quotation marks omitted).

We believe this limitation adequately serves the common law context as well. It accords common law courts the substantial leeway they must enjoy as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevaluating and refining them as may be necessary to bring the common law into conformity with logic and common sense. It also adequately respects the due process concern with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law. Accordingly, we conclude that a judicial alteration of a common law

> doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Ibid.

The majority in *Rogers* found that the Tennessee Supreme Court's retroactive application to the petitioner of its decision abolishing a rule of state criminal law, "the year and a day rule" in homicide cases, did not deny the petitioner due process of law in violation of the Fourteenth Amendment. In a dissent joined by Justices Scalia, Thomas and Breyer, Justice Stevens wrote that the majority had "undervalued the threat to liberty that is posed whenever the criminal law is changed retroactively." Franz Kafka would agree with the dissent.

The petitioner *Rogers* had been convicted of garden-variety murder. Unlike in, say, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (hate-crime legislation), and *Fiore v. White*, 121 U.S. 712 (2001) (environmental regulation), there was no underlying issue championed by the Federalist Society, so the dissenting votes of Justices Scalia and Thomas are genuinely significant.

But this court's imposed sanction violates all three of the three premises even of the *Rogers* majority.

First, all of this court's stated grounds for the sanction – those it states in its August 31 order and those it states in its September 19 order – depend upon novel interpretations of the

following statutes or codified rules: 28 U.S. § 1927; 28 U.S.C. §451; 28 U.S.C. § 1983; 28 U.S. § 1341; Fed. R. Civ. P. 8(c) ("Res judicata is an affirmative defense that is waived if a party does not plead it. Fed. R. Civ. P. 8(c)." *National Organization for Women v. Scheidler, et al.*, 7th Cir. Oct. 2, 2001, No. 99-3076); Illinois Supreme Court Rule 381.

Second, even to the extent that this court purports to rely upon case authority for its interpretation of statute, it offers no apposite case authority whatsoever. In one of the silliest lines Mann has ever read in a court order or opinion, this court limits its sanctions order "to costs and expenses the defendants have incurred in the federal portion of the litigation." How measured, how downright lenient, of this court. These defendants incurred costs and expenses in "the state portion of the litigation" only in this court's delusional mind. These defendants were *not parties* to "the state portion of the litigation."

This is a concept too difficult for these reputedly bright judges to comprehend only because comprehension of it would require them to back away from their insistence that *Pennzoil v. Texaco*, 481 U.S. 1 (1987), is not only pertinent but is so obviously so that Mann must be sanctioned for proceeding in the face of it.

This court's Lewis Carroll-esque *Pennzoil* fantasy violates the principle of fair warning, and hence must not be

given retroactive effect because it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

Third, the essence of the Court's justification for its bottom-line ruling in *Rogers* – "the divergent pulls of flexibility and *precedent in our case law system*" – is incompatible with a departure from common law in an unpublished and uncitable order. "The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles. It was on account of concerns such as these that Bouie restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'"

To which Mann says: Fine. This justification eliminates the pull of flexibility as a justification *except* as precedent, *except* as evolved common law, *except* as citable authority. *Except* – as precedent. Period.

The Supreme Court has never to Mann's knowledge addressed an issue comparable to that in *Rogers* regarding monetary sanctions ordered sua sponte by a court in civil litigation, let alone by an *appeals* court against a plaintiff for proceeding with litigation in the face of affirmative defenses *asserted only by the court on behalf of the defendants* and of

questionable legitimacy. Much less has it considered sanctions imposed sua sponte by an appeals court and determined *before* the sanctioned party/attorney was notified *even* of the supposed affirmative defenses upon which the sanction ostensibly was based.

Mann will ask that the Court consider these issues in this case, and she now thinks it might.

After all, in *Rogers* at least the law itself was changed, if retroactively. The law was changed not solely *for* Rogers but *by* Rogers' case.

And on the day it issued *Rogers*, the Court also issued *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (May 14, 2001), holding that due process imposes substantive limits on the discretion of a court to impose fines and other punishments in civil litigation. Punitive damages in civil lawsuits must comply with the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments, the Court said in *Leatherman* – seemingly placing this court's sanction against Mann comfortably outside constitutional bounds.

Leatherman requires de novo appellate review of punitive damages awards – after de novo review by the district judge, and in turn after the legal and factual issues were aired in a full adversarial trial. Earlier, in *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1996), the Court subjected

punitive damages to a three-pronged due process test in which courts are required to evaluate the "degree of reprehensibility" of the wrongdoing, "the disparity between the harm or potential harm suffered by" the recipient of the damages award and the award itself, and "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." 517 U.S. at 575.

In Mann's case, this court not only made its sanctions decision before Mann was notified of any purported grounds for it but the final sanctions order itself failed to acknowledge the essence of her necessarily-too-late response, and it stated grounds significantly different than any she was ostensibly allowed to address. Ultimately it sanctioned her for complying with an explicit state-court order and with explicit state law while saying it was sanctioning her for failing to do exactly that.

Then, of course, her motion for leave to file a petition for rehearing regarding the actual sanctions order was denied – by a single judge, Judge Easterbrook.

This sanction is exactly that; it is pure punishment, not compensation. Sua sponte punish-ments by an appeals court cannot be reviewed de novo except by the Supreme Court, so it is all the more imperative constitutionally that appellate courts accord meaningful procedural and actual substantive due process before imposing them.

This court took pains to accord Mann *neither*. No judge (nor law clerk) read her briefs nor researched pertinent law; that much is indisputable. And two of the judges compliantly signed onto whatever it was that the third judge wrote, sight unseen. Witting puppets or just plain lazy? It really doesn't matter. Circuit Rule 53 to their rescue.

Oh, and what was it the Supreme Court said in *Rogers* about protecting against vindictive or arbitrary judicial lawmaking by safeguarding against unjustified and unpredictable breaks with prior law?

Most respectfully submitted,

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